Docket for 03-377

(17)

No. 03-377
Title: Koons Buick Pontiac GMC, Inc., Petitioner
v.
Bradley Nigh
Docketed: September 11, 2003
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (01-2201, 01-2224)
Decision Date: February 4, 2003
Rehearing Denied: July 9, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 4 2003	Petition for writ of certiorari filed. (Response due October 14, 2003)
Oct 14 2003	Motion for leave to file amici curiae brief filed by Virginia Automobile Dealers Association, et al.
Oct 14 2003	Motion for leave to file amici brief filed by American Bankers Association, et al.
Oct 14 2003	Waiver of right of respondent Bradley Nigh to respond filed.
Oct 22 2003	DISTRIBUTED for Conference of November 7, 2003.
Nov 5 2003	Response Requested . (Due December 5, 2003)
Nov 18 2003	Order extending time to file response to petition to and including December 22, 2003.
Dec 19 2003	Brief of respondent Bradley Nigh in opposition filed. (Distributed)
Dec 23 2003	DISTRIBUTED for Conference of January 9, 2004.
Dec 29 2003	Reply of petitioner Koons Buick Pontiac GMC, Inc. filed. (Distributed)
Jan 12 2004	DISTRIBUTED for Conference of January 16, 2004.
Jan 20 2004	Motion for leave to file amici brief filed by American Bankers Association, et al. GRANTED.
Jan 20 2004	Motion for leave to file amici brief filed by Virginia Automobile Dealers Association, et al. GRANTED.
Jan 20 2004	Petition GRANTED.
Feb 3 2004	Extension of time within which to file petitioner's brief on the merits to and including April 19, 2004.
Apr 1 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Apr 13 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Apr 14 2004	Motion to dispense with printing the joint appendix filed by petitioner.
Apr 15 2004	Brief amicus curiae of Michigan Bankers Association filed.
Apr 16 2004	Motion for leave to file amicus brief filed by National Automobile Dealers Association.
Apr 19 2004	Brief of petitioner Koons Buick Pontiac GMC, Inc. filed.
Apr 19 2004	Brief amici curiae of Virginia Automobile Dealers, et al. filed.
Apr 19 2004	Brief amici curiae of American Bankers Association, et al. filed.
Apr 26 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Apr 27 2004	Extension of time within which to file respondent's brief on the merits to and including June 8, 2004.

May 24 2004	Motion for leave to file amicus brief filed by National Automobile Dealers Association GRANTED.
Jun 8 2004	Brief of respondent Bradley Nigh filed.
Jun 8 2004	Brief amicus curiae of Commercial Law League of America filed.
Jun 8 2004	Brief amici curiae of National Association of Consumer Advocates, et al. filed.
Jun 30 2004	Reply of petitioner Koons Buick Pontiac GMC, Inc. filed.
Jul 23 2004	CIRCULATED.
Aug 3 2004	Record received from U.S.C.A. 4th Circuit. (1 box)
Aug 20 2004	Record received from U.S.D.C. Eastern Dist. of Virginia. (1 box)
Aug 24 2004	SET FOR ARGUMENT Tuesday, October 5, 2004.
Oct 5 2004	Argued. For petitioner: Donald B. Ayer, Washington, D.C. For respondent: A. Hugo Blankingship, III, Alexandria, VA.
Oct 5 2004	Letter from counsel for the respondent, dated 09/28/04 received. (Distributed).

(1)

Supreme Court, U.S.
FILED

No. 03- 377 SEP 4 2003

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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91 pp

QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A) – though there is no evidence of any Congressional intent to effect such a change – so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Bradley Nigh, Koons Buick Pontiac GMC, Inc., and Household Automotive Finance Corporation. Petitioner Koons Buick Pontiac GMC, Inc., states, pursuant to Supreme Court Rule 29.6, that it has no parent companies, subsidiaries, or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

Koons Buick Pontiac GMC, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-22a) was issued on February 4, 2003 and is reported at 319 F.3d 119 (4th Cir. 2003). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 55a-56a) was issued on July 9, 2003 and is unreported.

The judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division (Pet. App. 23a-40a), was issued on August 15, 2001 and is unreported. The order of the district court concerning attorneys' fees awarded to Respondent (Pet. App. 41a-54a) was issued on August 10, 2001 and is unreported.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for rehearing and rehearing *en banc* was issued on July 9, 2003. (Pet. App. 55a-56a) This Court has jurisdiction under 28 U.S.C. § 1254(1) (2003).

STATUTE INVOLVED

Section 1640(a) of the Truth in Lending Act (TILA) provides, in pertinent part, that:

> (a) [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of –
>
> > (1) any actual damage sustained by such person as a result of the failure;

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2000.

15 U.S.C. § 1640(a) (2003).

STATEMENT

A. Statutory Background

Congress enacted TILA in 1968, Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1666 (2003)), to address concerns about both a lack of uniformity in lender disclosures to consumers and deceptive credit practices, S. REP. NO. 90-392, at 2 (1967). Congress therefore sought to protect consumers by "assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." Consumer Credit Protection Act § 102.

Thus TILA is primarily a disclosure statute which imposes requirements in connection with a very broad range of consumer credit transactions.[1] The most important of these

[1] TILA established requirements for two categories of credit: (1) closed-end credit, including individual transactions involving direct loans and installment credit sales, where credit extended in connection with a single transaction is usually payable over a fixed term (e.g., automobile financing, home equity loans, bank signature loans, small loans, and home mortgages); and (2) open-end credit, which generally includes "plans" which contemplate repeated transactions and impose finance charges from time to time on an unpaid balance (e.g., credit card plans, charge accounts, home equity lines of credit, and revolving credit plans). Consumer Credit Protection Act § 103(i) (codified as amended at 15 U.S.C. § 1602(i)) (definition of "open-end" credit); *see also* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING §§ 1.01[1], 5.01[1] (2000).

provisions mandate disclosure of the "finance charge" (the total cost to the consumer of credit) and the annualized simple interest rate of that finance charge (the "annual percentage rate"). 15 U.S.C. §§ 1605-1606.[2] The Act governs both lending documents created at the initiation of a transaction and subsequent documents, such as periodic statements. 15 U.S.C. §§ 1637-1639. In addition to its disclosure mandates, TILA's implementing regulations also impose procedural requirements, such as prescribed processes for resolving billing errors in open-end credit plans. *See* Regulation Z, 12 C.F.R. § 226.13 (2003).[3]

TILA provides a three-pronged enforcement mechanism: administrative agency enforcement, criminal penalties, and private civil liability. 15 U.S.C. §§ 1607, 1611, 1640. Since TILA's enactment, though, agency enforcement and assessment of criminal penalties have been relatively rare, while private civil actions have emerged as the dominant source of enforcement. *See* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING § 13.01 (2000) (emergence of civil enforcement); *see also Edwards v. Your Credit, Inc.*, 148

[2] Other required disclosures include time periods in which balances may be repaid without incurring finance charges, conditions under which charges are imposed, the methods of determining charges, various dates (e.g., payment due dates), additional charges, total amounts financed, potential delinquency charges, and descriptions of any creditor security interests related to the transaction. 15 U.S.C. §§ 1637-1639.

[3] TILA directed the Federal Reserve Board to promulgate regulations, now known as Regulation Z, to accomplish the Act's purposes. *See* Regulation Z, 12 C.F.R. § 226. Regulation Z is the primary source to which lenders turn for compliance guidance.

F.3d 427, 432 (5th Cir. 1998). Although criminal liability under TILA may attach only for certain willful and knowing violations, *see* 15 U.S.C. § 1611, TILA establishes a remedial scheme of virtually strict liability in the civil context. 15 U.S.C. § 1640.

Outside TILA's minimal statutory margins for error,[4] creditors violating the Act's disclosure requirements may avoid liability under Section 1640 only by correcting errors within 60 days of discovery (and notifying the obligor of the correction), 15 U.S.C. § 1640(b), or by "show[ing] by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1640(c). Creditors failing to comply with the Act's substantive requirements, such as mandated billing error resolution processes in open-end credit plans, will likewise be subject to strict liability under TILA's provision for civil actions. 15 U.S.C. § 1640 (imposing liability for violations of "any requirement" of the Act, including provisions related to credit transactions (Part B), credit billing (Part D), and consumer leases (Part E)).

As initially enacted in 1968, the statutory damages provision, which allows recovery without proof of any injury, contained only the measure of recovery now at issue, with a $100 minimum and a $1,000 maximum – "twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1000. . . ." Consumer Credit Protection Act § 130(a); *see* H. R. REP. NO. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1976 (explaining scheme based on double the finance charge with $100

[4] *See* 15 U.S.C. § 1605(f)(1)(A) ($100 margin for error in loans secured by real estate); 12 C.F.R. § 226.14(a) (providing margin for error in APR calculations of 1/8 of 1 percent); 12 C.F.R. § 226.18(d)(2) ($5 variance for transactions with $1,000 or less financed and $10 variance for transactions with $1,000 or more financed).

minimum and $1,000 maximum). In 1974, the statute was amended to allow for recovery of actual damages in addition to the statutory damages already available. *See* Truth in Lending Act Amendments of 1974, Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1518 (1974); 15 U.S.C. § 1640(a)(1).

In 1976, Congress passed the Consumer Leasing Act, which applied truth-in-lending protections to consumer leases. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976). Leases had been increasing in popularity, particularly in the automotive industry, and because they typically did not impose "finance charges" on consumers, they had not previously been covered by TILA. S. REP. NO. 94-590, at 2 (1976). As part of the Act, Congress amended the statutory damages provision at issue here, inserting a second clause (ii) between the provision for "twice the amount of the finance charge" and the $100-$1,000 damages limitation. Consumer Leasing Act of 1976 § 4.[5]

Nothing in the language or history of this 1976 amendment suggested any purpose of rendering the $100-$1,000 limitation inapplicable to the original "twice the amount of the finance charge" measure of liability. To the contrary, the Senate Report simply explained that the Act was creating for consumer leases a civil penalty "equivalent in dollar amount to that imposed on other creditors." S. REP. NO. 94-590, at 8.

[5] The provision thus imposed liability

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000. . . .

15 U.S.C. § 1640(a)(2)(A) (1976).

Accordingly, following the 1976 amendment, cases predicating liability on subpart (i) consistently found the $100-$1,000 limitation still to apply. *See Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) (stating that "[i]n the event that a creditor fails to [comply with TILA], a consumer may bring a civil action against the creditor [and] may recover twice the amount of the finance charge (but not less than $100 nor more than $1,000)"); *Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995) (noting that statute allows "the recovery of twice the finance charge up to $1,000"); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) (stating that statute allows twice the finance charge, capped at $1,000); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981) (noting that statutory damages are "in the amount of twice the finance charge, with liability of not less than $100 and not more than $1,000").

In 1995, the statute was amended yet again, this time by the addition to Section 1640(a)(2)(A) of a new subsection (iii), which contained a damages clause covering a second subcategory of credit transactions: closed-end loans secured by real estate (e.g., mortgages, refinancings and home equity loans). Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 6, 109 Stat. 271, 274 (1995). This change did not create a new form of liability; these transactions had been covered under the previous statute. It simply increased the potential liability for such loans to "not less than $200 or greater than $2000."

Other than that addition, the movement of the word "or" to immediately precede "(iii)," and the updating of a statutory reference included in subsection (ii), Congress did not change a single word of the pre-existing clauses.[6] Nor is there any

[6] The revised statute imposes liability "in an amount equal to the sum of":

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2000.

15 U.S.C. § 1640(a)(2)(A).

hint in the statutory language or in the legislative history of any purpose or policy of removing the longstanding $100-$1,000 limitation from the liability provision based on twice the amount of the finance charge. Congress's sole apparent purpose in adding the new subpart (iii) was to subject closed-end loans secured by real estate to slightly greater liability (a $2,000 cap in place of the previous $1,000 cap). *See* H. R. REP. NO. 104-193, at 99 (1995); 141 Cong. Rec. S14566, S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); 141 Cong. Rec. H9513, H9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum). There was never any suggestion that Congress contemplated at the same time removing the existing $1,000 cap for other types of consumer transactions under subpart (i).

B. Proceedings Below

In February 2000, Respondent Nigh sought to purchase a used 1997 Chevrolet Blazer from Petitioner Koons Buick Pontiac GMC, Inc., and to trade in his prior vehicle. This transaction went through several permutations and was subject to various disagreements and misunderstandings between the parties.

Initially, to receive consumer financing, Respondent executed a Buyer's Order, reflecting the proposed purchase, and a Retail Installment Sales Contract (RISC), reflecting the proposed financing. Both documents indicated that Respondent would pay $4,000 down and trade in his prior vehicle. Respondent estimated the trade-in vehicle's

remaining loan balance and agreed to pay off any excess balance above this amount. Once Respondent paid the $4,000 down payment and tendered his trade-in vehicle, Petitioner began seeking a lender to buy an assignment of the installment payments owed by Respondent under the RISC.

In order to satisfy a prospective lender, Household Automotive Finance Corporation (HAFC), Petitioner restructured the deal to require an additional $2,000 down payment from Respondent, necessitating a new RISC. After some protest, Respondent signed the second RISC, along with a $2,000 promissory note for the increased down payment. However, when Petitioner was informed by HAFC that an additional charge for a Silencer car alarm had been mistakenly included in these new documents, it prepared a third RISC deleting reference to and charges for the Silencer.

Respondent returned to the dealership and signed the third RISC. Petitioner was then able to close the transaction by executing the contract documents and selling an assignment of Respondent's installment payments to HAFC.

Contrary to his agreement, Respondent failed, after a number of requests, to pay the excess amount over the estimated loan balance owed on his trade-in vehicle – nearly $2,000. Accordingly, HAFC repossessed that vehicle from Petitioner's lot. Thereafter, Respondent, who alleged that he had previously believed the trade-in vehicle no longer belonged to him, indicated that he would honor his contractual commitments, and Petitioner paid both the lien and the repossession charges owed on the trade-in vehicle in order to have it released by HAFC. However, Respondent never made the promised payments.

After driving the Blazer for a number of weeks, Respondent returned it to the dealership asserting a right of rescission because of the issues involving his trade-in vehicle. Respondent had not made a single payment on the Blazer other than the initial $4,000 down payment amount; nor had he attempted to pay the $2,000 promissory note.

On October 3, 2000, Respondent filed suit in the United States District Court for the Eastern District of Virginia, advancing claims under the Truth in Lending Act (TILA), the Federal Odometer Act (FOA), and the Virginia Consumer Protection Act (VCPA), along with claims sounding in contract, fraud, and conversion. In turn, Petitioner filed counterclaims for breach of contract and fraudulent and negligent misrepresentation.

On April 20, 2001, the district court granted summary judgment to Petitioner on most of its counterclaims and entered judgment for Petitioner on all but three of Respondent's claims. Only Respondent's FOA, VCPA, and TILA claims remained for trial, which was held on May 2, 2001.

After a conference with counsel during trial on the "issue of the maximum recovery" under TILA, the district court rejected Petitioner's argument that any TILA award to Respondent should be limited to $1,000, recognizing that its ruling conflicted with a holding by the Seventh Circuit on the same issue. *See* Joint App. ("JA")[7] at 647, 655. The court therefore instructed the jury that if it found Petitioner to have violated TILA, Respondent was "entitle[d] . . . to receive statutory damages of twice the amount of any finance charge in connection with the transaction." *Id.* at 670. In response to these instructions, the jury submitted a question to the court, asking whether it was required to give Respondent twice the finance charges if it found Petitioner had violated TILA, or whether it "ha[d] the discretion to give a different amount." *Id.* at 749. The court informed the jury that it did "not have the discretion to award a lesser amount" if it found for Respondent on the TILA claim. *Id.* at 753.

On May 3, 2001, the jury returned a verdict in Petitioner's favor on the FOA claim and in Respondent's favor on the

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[7] "JA" refers to the Joint Appendix filed by the parties in the Fourth Circuit.

TILA and VCPA claims. On the TILA claim, the jury awarded Respondent $24,192.80, twice the amount of the finance charges in connection with the second RISC. *Id.* at 756-57. On the VCPA claim, the jury awarded Respondent $4,000, the amount of the down payment he originally tendered to Petitioner.

On August 10, 2001, the district court awarded Respondent attorneys' fees and court costs in the amount of $26,129.10. (Pet. App. 53a) On August 15, 2001, the court entered final judgment, awarding Respondent $24,192.80 for violation of TILA, 15 U.S.C. § 1640(a)(2)(A)(i), and $4,000 for violation of the VCPA, Va. Code Ann. § 59.1-200, plus interest. (Pet. App. 37a-39a) In addition, the court awarded Petitioner $2,000 for Respondent's failure to pay on his promissory note and $1,959.73 for Respondent's breach of his agreement to pay the excess over his trade-in vehicle's loan balance. (Pet. App. 39a)

On February 4, 2003, a panel of the Fourth Circuit affirmed the judgment of the district court. (Pet. App. 1a-22a) Although other issues were before the Fourth Circuit, the only issue relevant to this petition is the calculation of statutory damages for the jury's finding that Petitioner violated TILA, on which the Fourth Circuit panel divided two-to-one.

The majority, focusing solely on the language of the current, amended TILA damages provision, affirmed the award of statutory damages of twice the finance charge in connection with the transaction, determining that the $1,000 damages cap described in Section 1640(a)(2)(A) applied only to subpart (ii), which it immediately follows. (Pet. App. 11a)[8] The Court determined that whereas before the 1995 amendment to TILA's statutory damages provision "it was

[8] The majority found TILA liability arose from Respondent's signing of the second RISC and his giving over the signed documents to Petitioner, even though this finance agreement was not ultimately funded and Respondent thus suffered no injury under this agreement. (Pet. App. 7a)

plausible to interpret the maximum and minimum provision as coming at the end of subparagraph (A), and not exclusively within subparagraph (ii), the new provision clearly places that clause wholly within (ii)." (Pet. App. 11a) The majority reasoned that the different statutory maximum and minimum in subpart (iii) "shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii)." (Pet. App. 11a) Discounting the statutory provision's prior history, the majority limited the question before it "simply [to] whether Congress amended the statute in a way relevant to the prior interpretation, and if it did, what does the amended statute mean." (Pet. App. 12a) The court conceded that "[i]t could well be . . . that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995." (Pet. App. 13a) Nonetheless, the court determined that "the critical point of law – and it is critical – is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent." (Pet. App. 13a) Based upon that amended statute, the majority concluded that "Congress did alter the statutory cap regardless of its intent" and that "[i]t is the statute, not any inferential intent, that constitutes the law." (Pet. App. 13a)

In his dissent, Judge Gregory opined that application of the $1,000 damages cap, which had been applied universally to TILA violations under subpart (i) of the previous manifestation of the statutory provision, did not change with the amendment to the provision, and that Respondent's TILA award under Section 1640(a)(2)(A)(i) should therefore have been capped at $1,000. (Pet. App. 17a) Judge Gregory also reasoned that "[i]f the $1,000 cap was intended to apply only to (ii) . . . then the inclusion of the phrase 'under this subparagraph' in subpart (ii) would be superfluous; the meaning of (ii) would be unchanged by its deletion." (Pet. App. 21a) Further, Judge Gregory pointed out, the majority's interpretation of the phrase "under this subparagraph" is

inconsistent with the use of the same phrase in Section 1640(a)(2)(B) (concerning class actions), where the words indisputably apply to all of subparagraph (B). He also noted that the effect of the majority's view is "to dramatically increase creditors' exposure to liability under Section 1640(a)(2)(A), without any explicit, statutory language to support such an increase." (Pet. App. 22a)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT TILA'S $1,000 DAMAGES CAP DOES NOT APPLY TO CLAIMS UNDER SECTION 1640(a)(2)(A)(i) CREATES A CLEAR CONFLICT IN THE CIRCUITS

This case involves a sharp and financially important departure – and a split in the circuits – in the interpretation of TILA's most commonly applied liability provision, Section 1640(a)(2)(A)(i). Prior to the decision below, since the original enactment of TILA in 1968, all federal courts of appeals have consistently recognized that recoveries of statutory damages in a credit transaction – absent proof of actual damages – are limited by the statute's $100-$1,000 floor and ceiling. When the Fourth Circuit affirmed the district court's award of $24,192.80 plus $26,129.10 for attorneys' fees and costs[9] (plus interest) based on Petitioner's TILA violation on the ground that the $1,000 cap is no longer applicable to subpart (i), it created a circuit split that will likely be a fount of much wasteful and speculative litigation.

[9] Although attorneys' fees are recoverable under both TILA, 15 U.S.C. § 1640(a)(3), and VCPA, Va. Code Ann. § 59.1-204, it is reasonable to believe that the total amount of any attorneys' fee award would be impacted by a decision by this Court to reduce Respondent's TILA award from $24,192.80 to $1,000. Petitioner, therefore, seeks reversal of the TILA damage award and remand for reconsideration of the fee award.

As the dissenting opinion in the Fourth Circuit points out, the majority's conclusion is in clear conflict with the United States Court of Appeals for the Seventh Circuit in *Strange v. Monogram Credit Card Bank of Ga.*, 129 F.3d 943, 947 (7th Cir. 1997). The Seventh Circuit in *Strange* concluded, as did Judge Gregory, that Congress had not intended to affect application of the $1,000 damages cap previously established for TILA violations under Sections 1640(a)(2)(A)(i) and (ii) when, in 1995, it amended 15 U.S.C. § 1640(a)(2)(A) to add a new subsection (iii) setting a $200 minimum and a $2,000 maximum on statutory damages arising from closed-end real estate credit transactions.

The Seventh Circuit noted that, although the reading that the $100-$1,000 limit in subpart (ii) applies only to that subpart "has a certain appeal given the fact that subsection (ii) is the only one of the three subparts to mention the $100/$1,000 amounts, the history of this part of the statute suggests that such a reading has its own problems." *Id.* The *Strange* court recounted the provision's statutory history, pointing out that courts had uniformly interpreted the $100 minimum and $1,000 maximum as applying to both subparts (i) and (ii) until "the 1995 addition of sub-subsection (A)(iii) that introduced the ambiguity with which we are now confronted." *Id.* The Seventh Circuit explained that "the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A)." *Id.* It therefore concluded that "the 'subparagraph' mentioned in § 1640(a)(2)(A)(ii) continues to encompass what is now codified as subparts (A)(i) and (A)(ii), not just subpart (A)(ii)." *Id.*

The split between the Fourth and Seventh Circuits concerning the meaning and application of Section 1640(a)(2)(A) is a crisp and clear one which will not be aided by further percolation in the courts of appeals. The Fourth Circuit has ruled, based solely on the current configuration of

the three subprovisions of Section 1640(a)(2)(A), that the $100-$1,000 limitation does not apply to Section 1640(a)(2)(A)(i). In contrast, the Seventh Circuit has determined that the $100-$1,000 limitation *does* apply to that provision. As set forth below, certiorari should be granted now in order to resolve this clear-cut question of statutory interpretation before the disagreement in the courts, and the possibility that other courts of appeals may agree with the Fourth Circuit's view, become the stimuli to much wasteful litigation.

II. BECAUSE THE FOURTH CIRCUIT'S INTERPRETATION OF SECTION 1640(a)(2)(A)(i) VASTLY INCREASES POTENTIAL RECOVERIES ARISING FROM THE MANY MILLIONS OF COVERED TRANSACTIONS OCCURRING EACH YEAR, THE QUESTION PRESENTED BY THIS CASE DEMANDS IMMEDIATE RESOLUTION

The certworthiness of this case, which presents an uncomplicated split between two circuits, rests in major part upon the broad scope of transactions to which Section 1640(a)(2)(A)(i) applies and the significant consequences threatened by its inconsistent application in the courts.

Subpart (i) of TILA's statutory remedy provision covers lender practices relating to a broad range of consumer credit transactions, including vehicle purchases, small loans, payday loans, home equity lines of credit, and credit card plans and periodic statements. 15 U.S.C. § 1640(a)(2)(A)(i); *see also* 15 U.S.C. §§ 1637(a), 1637(b), 1637a, 1638 (coverage of credit card plans, periodic statements, home equity lines of credit, and vehicle purchases and other extensions of closed-end credit, respectively).

Each year American consumers receive more than 16 billion monthly credit card statements for over 1.4 billion U.S. accounts, are issued approximately 150 million new credit cards, receive 180 million payday loans, open millions of new home equity lines of credit, and enter into millions of other

small loan transactions.[10] Moreover, U.S. consumers annually purchase more than 45 million new and used cars, 14.5 million computers, and millions more home appliances, home electronics systems, and home furnishings.[11] Substantial numbers of these purchases – including the vast majority of vehicle sales – are credit financed.[12] All of these credit issuances, loans, and purchases financed by credit are governed by TILA's requirements and subject to Section 1640(a)(2)(A)(i)'s civil liability provision.

Because TILA's compliance requirements are complex, there is significant opportunity for error in the implementation of its provisions. For all transactions covered by TILA, creditors must generate substantial paperwork containing numerous transaction-specific disclosures and technical provisions. *See* 12 C.F.R. §§ 226.5-226.9, 226.17-226.20

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[10] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, 1165 (2002) (1.44 billion active credit cards in 2000); CardWeb.com, Inc., *Frequently Asked Questions: How Many Cards Are Issued Annually?*, *at* http://www.cardweb.com/cardlearn/faqs/2002/jun/10.amp (last visited Aug. 21, 2003) (credit card issuances); Robert W. Snarr, Jr., *No Cash 'til Payday: The Payday Lending Industry*, Federal Reserve Bank of Philadelphia, COMPLIANCE CORNER, First Quarter 2002, at 1 (payday loans); U.S. CENSUS BUREAU, STATISTICAL BRIEF: HOME EQUITY LINES OF CREDIT 2 (1995), *at* http://www.census.gov/apsd/www/statbrief/sb95_15.pdf (824,000 line of credit originations in 1990); Ruth Simon & Zachery Kouwe, *Why a Rate Cut Might Hurt You*, WALL ST. J., June 25, 2003, at D1 (home equity lines of credit "have exploded in popularity" in recent years).

[11] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT, at 1011 (vehicle purchases); U.S. CENSUS BUREAU, COMPUTERS AND OFFICE AND ACCOUNTING MACHINES: 2001 tbl.2 (2002) (personal computers).

[12] *See* National Automobile Dealers Association, *Financing Tips*, *at* http://www.nada.org/NADAGuides/Finance_Tips.htm (last visited Aug. 21, 2003) (70 percent of new car purchases); Indiana Department of Financial Institutions, *How to Finance a Used Car*, *at* http://www.in.gov/dfi/consumer/pdfs/howfinucar.pdf (last visited Aug. 21, 2003) (majority of used car purchases).

(detailing disclosure requirements); *see also* ROHNER & MILLER, *supra*, § 1.01 (noting creditors' "compliance headaches" generated by "the intricate rules and subrules of the TIL Act and its attendant regulations, commentary, and judicial constructions").

Should inaccuracies be found in the information included by a lender or creditor in these documents, TILA liability applies without affirmative proof of fault. 15 U.S.C. § 1640(a); *see also* ROHNER & MILLER, *supra*, § 12.01[1]; discussion *supra* p. 4. And failure to comply is not a mere possibility: The FDIC has found that TILA is the most commonly violated consumer protection law. *See* FDIC, *Common Compliance Violations*, FIL-61-97 tbl. (Sept. 2, 1997), *at* http://www.fdic.gov/news/news/financial/1997/fil9787b.html (last visited Aug. 21, 2003) (finding that 76% of banks violated TILA in 1996).

Because so many millions of transactions are potentially subject to liability under TILA's Section 1640(a)(2)(A)(i) statutory damages provision, because TILA's disclosure requirements are so easily violated, and because the financial consequences of the Fourth Circuit's interpretation are so dramatic, the present split in the circuits threatens havoc for affected industries and for the courts. With potential liabilities increased from the nominal sum of $1,000 to exposures many times that, lawyers and consumers, not only in the Fourth Circuit but in every other circuit that has not yet addressed the issue, have a newfound incentive to litigate colorable claims from among the many millions of covered transactions.

As the Fourth Circuit majority in this case construed the provision, reading the $100-$1,000 damages cap out of subpart (i), liability increases wildly without any correlation to injury suffered. Instead of prospective defendants owing at most $1,000 on each individual violation of TILA, statutory damages simply equal twice the total finance charges that could ultimately be paid under the loan agreement. That is the derivation of the $24,192.80 award in this case in connection with Respondent's purchase of a used truck. In many

extensions of consumer credit – for an expensive new automobile or under an open-end home equity line of credit, for example – the amount recoverable under the Fourth Circuit's interpretation could well be many multiples of that amount. The potential windfall recoveries available under this reasoning, in the Fourth Circuit and in any circuit that may be moved to adopt its reasoning, provide a substantial incentive for consumers and attorneys to bring suit and pursue litigation. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994) (noting that uncertainty in interpretation of rules can lead to excessive litigation); *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992) (noting that a clear rule reduces litigation). Given the vast number of covered transactions, the resulting volume of litigation could well be quite large.[13]

TILA's history in the courts illustrates all too plainly how uncertainty about the legal consequences of certain actions can stimulate extensive litigation where so many covered transactions are potentially at issue. In TILA's first decade alone, more than 2,000 TILA and consumer fraud cases were filed annually in the federal courts, accounting for approximately two percent of the federal civil caseload. Truth in Lending: Revised Regulation Z, 46 Fed. Reg. 20,848, 20,942 (Apr. 7, 1981); ROHNER & MILLER, *supra*, § 1.02[2] n.33. During that period, many issues of statutory construction were unsettled, and enterprising consumers and

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[13] This likely consequence is even greater in view of the Fourth Circuit's conclusion that recovery is available regardless of whether the claimant has paid any portion of the financing charge, or even whether the lending agreement has been executed by both parties. (Pet. App. 7a) *But see Bragg v. Bill Heard Chevrolet, Inc. - Plant City*, 245 F. Supp. 2d 1235, 1238 (M.D. Fla. 2003) (disapproving and refusing to follow the Fourth Circuit's holding in *Nigh* that TILA can encompass unfunded financing agreements because the Fourth Circuit's conclusion was based on policy results rather than either the official interpretation of "consummation" under Regulation Z or Virginia contract law).

lawyers were spurred to litigate by the prospects of even a nominal recovery.

As was widely noted at the time, much of this litigation was highly – indeed hyper – technical, and, given the strict liability nature of the statute, involved no showing of fault or ill-will by defendants. *See, e.g., Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1385 (11th Cir. 1984) (Hill, J., dissenting) ("TILA litigation is becoming a game of 'gotcha,' with the 'unwary' credit consumer (or his attorney) holding many wild cards [and] the 'sophisticated' money lender holding more rules and regulations than guiding instructions . . . ."); *Wilson v. Allied Loans, Inc.*, 448 F. Supp. 1020, 1022-23 (D.S.C. 1978) (calling TILA "barratrous legislation" which "transforms loan documents into contest puzzles"); *Simplify and Reform the Truth in Lending Act: Hearings on S. 1312, S. 1501, and S. 1653 Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Hous., and Urban Affairs*, 95th Cong. 127-28 (1977) (statement of Sen. Garn) (noting "the ever-growing burden" resulting from "suits based on non-willful technical violations").

This litigation was often driven by pursuit of windfall recoveries for plaintiffs unable to prove any actual injuries and simply seeking to invoke the same statutory damage provision at issue in this case. *See, e.g., Sanders v. Auto Assocs., Inc.*, 450 F. Supp. 900, 902 (D.S.C. 1978) (noting that many "plaintiffs have merely sought a windfall penalty from a lender"); John W. Edmonds & George W. Taylor, *Truth and Consequences*, 35 WASH & LEE L. REV. 367, 391 (1978) (stating that TILA "seems to serve mostly as a trap for the unwary creditor" producing plaintiff windfalls).

The wave of litigation in the early years of TILA ultimately subsided, as many of the ambiguities that were initially present under TILA were clarified by a combination of regulatory action, legislation, and court decisions. *See* Depositary Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 122 (1980); 46 Fed. Reg. 20,848; Christopher L. Peterson, *Truth, Understanding,*

and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act, 55 FLA. L. REV. 807, 890 (2003) (court decisions).

Today, another wave of litigation is threatened not by numerous ambiguities in the statute like those that plagued TILA's first years, but by a single court of appeals decision that dramatically alters the stakes for TILA plaintiffs and defendants. The Fourth Circuit has made it worthwhile for TILA lawyers and plaintiffs to invest more time and money in TILA cases pending not only in that circuit, but in other circuits which may be persuaded to adopt the Fourth Circuit's construction of Section 1640(a)(2)(A). By resolving this conflict in the circuits promptly, this Court can prevent a likely surge of unnecessary litigation.

III. THE FOURTH CIRCUIT'S CONCLUSION THAT THE $1,000 LIMIT WAS RENDERED INAPPLICABLE TO SECTION 1640(a)(2)(A)(i) BY THE 1995 AMENDMENT IS NOT SUPPORTED BY ANY REASONABLE READING OF THE STATUTORY LANGUAGE AND HISTORY

The court below erred by radically increasing the amount recoverable under TILA's thirty-five year old remedy provision based on twice the finance charge, without the hint of a suggestion that Congress ever intended to make such a change. As discussed above, *see supra* pp. 4-5, when TILA was originally enacted in 1968, the relevant provision contained only the measure of recovery now at issue, with the $100 and $1,000 minimum and maximum. Consumer Credit Protection Act § 130(a). Plainly, at that time, a recovery of twice the finance charge could not exceed $1,000.

When Congress amended the provision in 1976 to insert a second damages clause relating to consumer leases, *see* 15 U.S.C. § 1640(a)(2)(A) (1976), the language and legislative history of the statute confirmed that Congress did not intend to alter the application of the $100-$1,000 limitation to the original measure of liability based on "twice the amount of the

finance charge." *See* discussion *supra* p. 5. Accordingly, the courts uniformly continued to apply the limitation. *See Purtle*, 91 F.3d at 800; *Cowen*, 70 F.3d at 941; *Mars*, 713 F.2d at 67; *Dryden*, 661 F.2d at 1191 n.7.

Finally, Congress amended the TILA statutory remedy provision in 1995 to add a new subpart (iii), creating a basis of liability for closed-end loans secured by real estate with a liability limitation of "not less than $200 or greater than $2000." The enactment by which that change was made reads, in its entirety, as follows:

> Sec. 6. CALCULATION OF DAMAGES
>
> Section 130(a)(2)(A) of the Truth in Lending Act (15 U.S.C. 1640(a)(2)(A)) is amended –
>
> (1) by striking "or (ii)" and inserting "(ii)"; and
>
> (2) by inserting before the semicolon at the end the following: ", or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000".

Truth in Lending Act Amendments of 1995 § 6. Under the reasoning of the court below, this legislation rendered the $100-$1,000 limitation inapplicable to subpart (i). Yet, other than deletion of the single word, "or," nothing in this enactment addresses the pre-existing law in any way. And while the legislative commentary accompanying this amendment explains the reasons for setting a higher cap on closed-end real estate loans, it mentions nothing about the much more radical change asserted by the court below – the entire removal of the cap on recoveries under subpart (i), which all agree has applied since the statute's original enactment. *See* discussion *supra* pp. 6-7.

This fact is deemed irrelevant under the Fourth Circuit's reasoning – which simply involves a snapshot of the words of the statute as it now reads and a militant inattention to other interpretive tools. The Fourth Circuit's blindered reading of

the statute contravenes this Court's direction that statutory construction is a "holistic endeavor" which "must not be guided by a single sentence or member of a sentence" at "the risk of distorting a statute's true meaning," but instead must be guided by "the provisions of the whole law, and . . . its object and policy." *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993) (quotations and citations omitted).

Moreover, this Court has counseled against reading a major change into a statutory provision based on an amendment which makes little or no modification to the provision in question, when the legislative history indicates no basis for that change. *See Almendarez-Torres v. United States*, 523 U.S. 224, 233-34 (1998) (stating that neither the language nor the legislative history of an amendment which made a certain subsection parallel to a later enacted subsection suggested that "Congress intended to change, or to clarify, the fundamental relationship between the two subsections"); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993) (rejecting asserted interpretation of amendment to statute because "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect" in the legislative history); *Clarke v. Sec. Indus. Ass'n, Sec. Pac. Nat'l Bank*, 479 U.S. 388, 405-06 (1987) (rejecting asserted change in statutory meaning by changing certain words when there was "nothing in the legislative history . . . indicating that this change in the wording had substantive significance"); *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (concluding that "Congress intended nothing by the change in language" "[b]ecause the legislative history contains no indication that the variation in the language had changed the meaning" of the statute).

But the incorrectness of the decision below does not rest simply on its ascribing to the 1995 legislation a radical and inexplicable change in the meaning of Section 1640(a)(2)(A)(i) without any material change in the pre-

existing language or any hint of a legislative purpose to effectuate such a change. It rests as well on the fact that the court's literalist, plain-meaning approach gives at best an untidy account of the words of the resulting statute.

First, as Judge Gregory noted in his dissent, the majority opinion necessarily dances around the words "under this subparagraph," as they appear in both the pre- and post-1995 versions of the $100-$1,000 liability limitation, and ultimately explains its result on the ground that the "subparagraph" referred to after 1995 is different from the one referred to previously. (Pet. App. 20a-21a) All courts agree that the "subparagraph" referenced in the pre-1995 statute was Section 1640(a)(2)(A), not simply subpart (ii), just as the similar reference in Section 1640(a)(2)(B), both before and after 1995, necessarily refers to all of subsection (B). *See, e.g., United States Nat'l Bank of Oregon*, 508 U.S. at 460 (presuming that "identical words used in different parts of the same act are intended to have the same meaning") (quotation omitted). Yet the majority concludes that the meaning of "subparagraph" as used in Section 1640(a)(2)(A) was changed by the addition of subpart (iii), and now refers only to subpart (ii), rather than to the two pre-existing provisions of what had always been subparagraph A.[14] Further, as Judge Gregory pointed out, the court's reading renders the words "under this subparagraph" superfluous, since both the $100-$1,000 limitation at the end of subpart (ii), in which those words appear, and the $200-$2,000 limitation at the end of subpart (iii), in which they do not, are construed to apply only to the individual subpart and not to any other portion of subparagraph (A). (Pet. App. 21a)

Second, the majority's interpretation of the relationship between subparts (i) and (ii) creates a serious problem for the application of subpart (iii). According to the court, the addition of subpart (iii) in 1995 altered the reasonable

[14] Obviously, the phrase "liability under this subparagraph shall not be less than $100 nor greater than $1,000" cannot apply to subpart (iii), which carries its own explicit $200-$2,000 limitation.

understanding of the pre-existing two provisions by bringing the $100-$1,000 limitation wholly within subpart (ii). As a result, said the court, "the far better, . . . indeed [the] compelled, interpretation" was that the limitation ceased to apply to subpart (i), in which it had originally been enacted, and to which it had always applied. If that conclusion is indeed *compelled* by the simple juxtaposition of the three subparts, without any other basis in history or logic to support it, then presumably we must consistently refrain from importing by inference into one subpart of this section language omitted there but included in another subpart. But if that principle is the guide, then there is a serious problem with the application of subpart (iii), which applies to certain credit transactions secured by real property and says only that the recovery shall be governed by the $200-$2,000 limitation. Although subpart (iii) says nothing about how the underlying liability shall be calculated, sensibly, courts have read this provision as including by implication the "twice the amount of the finance charge" formula that is expressly included in the parallel language of subpart (i). *See, e.g., In re Ralls,* 230 B.R. 508, 522 (E.D. Pa. 1999) (holding that statutory damages under subsection (iii) "are measured by double the amount of the finance charges imposed in the transaction up to $2,000"); *accord In re Murray*, 239 B.R. 728, 734 (E.D. Pa. 1999). But if it is inappropriate, as the court found, to read language appearing in one subpart into another, then this conclusion cannot be justified, and subpart (iii) must be read as providing only a cap and floor on any recovery without providing any formula for determining its amount.

Accordingly, the decision below is certainly not compelled by the statutory language and, moreover, creates as many problems as it addresses. The fact that Congress's syntax may lack perfect symmetry does not justify the adoption of a construction that, in light of the Act's history and all available indicia of purpose and intent, is implausible in the extreme. *See, e.g., Caron v. United States*, 524 U.S. 308, 315 (1998) (refusing to read statute in a way that yields "bizarre" "results

contrary to a likely, and rational, congressional policy"); *Moreau v. Klevenhagen*, 508 U.S. 22, 33-34 (1993) (reading statutory phrase in the "most plausible" manner consistent with the regulations); *United States v. Hohri*, 482 U.S. 64, 70-72 (1987) ("determining the more plausible interpretation" of statutory language by investigating congressional intent).

Finally, the Fourth Circuit's interpretation, which mandates statutory damages of twice the finance charge with no maximum cap regardless of any actual injury to the plaintiff or bad intent by the defendant, may open up subpart (i) to a constitutional challenge. This Court recently made clear that "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property" in violation of the due process clauses of the Fifth Amendment. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001) (stating that constitutionality of award turns on "the degree of the defendant's reprehensibility or culpability," "the relationship between the penalty and the harm to the victim caused by the defendant's actions," and "the sanctions imposed in other cases for comparable misconduct"). Because the result below affords compulsory, uncapped, and potentially sizable statutory damage awards for minor, technical, and non-intentional TILA violations, it at least raises a question under the Fifth Amendment's due process clause and, as a result, should be rejected if another reasonable interpretation is available. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (admonishing that statutes should *not* be construed in a manner "that in turn could call upon the Court to resolve difficult and sensitive questions" of constitutional law).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September ___, 2003

APPENDIX

**UNITED STATES COURT OF APPEALS,
FOR THE FOURTH CIRCUIT.**

Bradley NIGH, Plaintiff-Appellee,

v.

**KOONS BUICK PONTIAC GMC, INCORPORATED,
Defendant-Appellant,**

and

Household Automotive Finance Corporation, Defendant.

Bradley Nigh, Plaintiff-Appellant,

v.

**Koons Buick Pontiac GMC, Incorporated; Household Automotive Finance
Corporation, Defendants-Appellees.**

Nos. 01-2201, 01-2224.

Argued Oct. 28, 2002.
Decided Feb. 4, 2003.

Before LUTTIG, WILLIAMS, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge LUTTIG wrote the opinion for the court. Judge WILLIAMS wrote an opinion concurring in part and concurring in the judgment in part. Judge GREGORY wrote an opinion concurring in part and dissenting in part.

OPINION

LUTTIG, Circuit Judge.

Bradley Nigh sued Koons Buick Pontiac GMC, Inc. (Koons Buick) for claims under the Truth In Lending Act (TILA), the

Federal Odometer Act (FOA), and the Virginia Consumer Protection Act (VCPA), along with numerous claims sounding in contract, fraud, and conversion, all in connection with his purchase from Koons Buick of a used 1997 Chevrolet Blazer. Koons Buick filed a counterclaim for breach of contract and fraudulent and negligent misrepresentation. At summary judgment, the district court granted judgment on several claims and all the counterclaims. Some of Nigh's TILA, FOA, and VCPA claims survived for a jury trial and resulted in a verdict finding Koons Buick liable for $24,192.80 under TILA, and for $4,000.00 under the VCPA. Koons Buick appeals from the jury's verdict, as well as from several of the court's orders. Nigh, in a cross-appeal, also challenges several of the court's orders. Finding no error in the verdict or the court's rulings, we affirm the judgment below.

I.

This case arose from Koons Buick's sale of a truck to Bradley Nigh. The sale was not a simple cash-for-product exchange, but involved a somewhat tortured effort by Koons Buick to provide Nigh consumer financing. Nigh first went to Koons Buick on February 4, 2000. While there, he decided to trade in his prior vehicle and buy the Blazer. To complete the sale, he executed a Buyer's Order, reflecting the proposed purchase, and a "Retail Installment Sales Contract" (RISC I), reflecting the proposed financing. The Buyer's Order and RISC I both reflected that Nigh would pay $4,000 down, and trade in his prior vehicle. Nigh received no price reduction for his trade-in because he estimated its remaining loan balance to equal the price Koons Buick gave him for it, but he also agreed to pay off any excess balance over the estimate. Nigh, having signed the contracts and turned them over to Koons Buick, was committed to the transaction and obliged to perform upon counter-signature by Koons Buick. Koons Buick did not counter-sign the documents as Nigh signed them, but intended to sign only once a lender agreed to buy an assignment of the installment payments owed under RISC I.

The transaction's closing and the completion of Nigh's purchase were thus left within the dealership's unilateral control.

Nigh left the dealership in the Blazer, on the authority of a temporary certificate of ownership issued under Va. Code § 46.2-1542. Nigh left his trade-in vehicle behind, in anticipation that a lender would purchase assignment of the payments owed under RISC I and the transaction would close. Koons Buick, however, was unable to find a willing lender. Consequently, it restructured the deal to require an additional $2,000 down payment. The dealership represented this change to Nigh as a "better deal" at a lower rate, necessitating a new RISC (RISC II). Nigh returned to the dealership on February 25 based on this representation, but told Koons Buick he did not have an additional $2,000. He asked to return the new truck, retrieve his trade-in vehicle, and walk away from the deal. Koons Buick, however, told him he could not withdraw because it had sold his trade-in. Nigh, unaware of this statement's falsity, and at a loss, signed RISC II and a $2,000 Promissory Note to cover the added down payment.

Koons Buick, again unable to find a willing lender, called Nigh back. Nigh alleged the dealership told him, via a message left with his brother, that he had to come back to sign a new RISC (RISC III) or it would report the Blazer as stolen. Afraid of arrest, Nigh returned to the dealership on March 5, and under protest, signed RISC III with a back-date of February 25. Koons Buick later closed the transaction by executing the contract documents and selling assignment of RISC III's installment payments to Household Automotive Finance Corporation (HAFC).

Afterwards, Nigh learned that his trade-in vehicle had been repossessed from the Koons Buick lot by its note-holder because Nigh, believing the vehicle to have earlier become property of Koons Buick, failed to make required payments. Nigh also learned that one of the reasons Koons Buick had

been unable to get a lender to accept RISC II was that it contained an unaccounted for charge, later determined to be for a product whose sale to Nigh had not been properly documented, which Nigh did not recall seeing on the transaction documents, and which he never requested, agreed to accept, or received. The product, a Silencer car alarm, was listed on the second Buyer's Order and on RISC II at a price of $965. But absent from the transaction documents was a Silencer "we owe" form, which is used in retail car sales to document the sale of "after market" products in financed transactions. Disgruntled by the whole affair, Nigh made no payments on the truck and returned it to Koons Buick with a letter asserting a right to rescission. HAFC repossessed the truck from the dealership's lot because Nigh made no payments.

Nigh, claiming that Koons Buick defrauded him, brought this action under the statutory authority of TILA, FOA, and the VCPA, and under the common law. Koons Buick counterclaimed for breach of contract. The district court granted summary judgment to Koons Buick on its counterclaims and on many of Nigh's claims, but preserved for trial limited claims under TILA, FOA, and the VCPA. At trial, Nigh prevailed on his TILA claim that Koons Buick intentionally included the charge for the Silencer on RISC II without a basis for the charge, and on his VCPA claim that Koons Buick violated the VCPA by telling him that he did not have valid possession of the Blazer in order to induce him to sign RISC III. The court issued a Supplemented and Final Judgment on August 15, 2001, three months after trial, to clarify its summary judgment ruling on Koons Buick's counterclaims. This order is the proceeding's final judgment, from which appeal is now had.

II.

As a preliminary jurisdictional matter, Nigh contends that Koons Buick did not timely file a notice of appeal. His

objection was already addressed by a motions panel of this court, and denied for lack of merit. The district court filed a Supplemented and Final Judgment on August 15, 2001, and it is against this date that the notice of appeal's timeliness must be measured, irrespective of the fact that the court had earlier filed a Final Judgment and had set a subsequent date at which point notice of appeals tolling would end. Assessed in light of the August 15, 2001, order, Koons Buick's notice was timely.

III.

The parties raise a variety of claims on appeal, none of which merit reversing the district court's conclusions of law or the fact-finder's determinations, but which we address in turn, beginning first with Koons Buick's claims.

A.

Koons Buick attacks the district court's denial of summary judgment on Nigh's claim that RISC II constituted a TILA violation on several grounds. First, Koons Buick argues that because RISC II was never counter-signed, it is an unfunded financing agreement and cannot form the basis for TILA liability. Under what is commonly known as Regulation Z, creditors operating under 15 U.S.C. § 1638(b)(1), which governs this transaction, must "make [TILA] disclosures *before consummation* of the transaction," 12 C.F.R. § 226.17(b) (emphasis added); *cf.* 15 U.S.C. § 1638(b)(1) ("disclosures . . . shall be made *before the credit is extended*" (emphasis added)). TILA liability, however, cannot accrue *until* a credit transaction is consummated, or put another way, "until credit is in fact extended," *Baxter v. Sparks Oldsmobile, Inc.*, 579 F.2d 863 (4th Cir. 1978) (holding that a signed buyer's order that contemplated an installment sales contract did not constitute an extension of credit and so no TILA violation occurred), since until credit is extended to a person in a particular transaction there are no credit terms against which to assess a disclosure's accuracy. The pertinent legal

question then is what consummation of a credit transaction, or extension of credit, encompasses.

Regulation Z defines consummation as the "time that a *consumer* becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2 (emphasis added). Under this regulation, a number of courts have held that consummation, or extension of credit, can encompass unfunded financing agreements. *See, e.g., Johnson v. Steven Sims Subaru, Inc.*, 1993 WL 761231 (N.D. Ill. 1993); *Bryson v. Bank of New York*, 584 F. Supp. 1306 (S.D.N.Y. 1984); *Madewell v. Marietta Dodge, Inc.*, 506 F. Supp. 286 (N.D. Ga. 1980); *Copley v. Rona Enterprises, Inc.*, 423 F. Supp. 979 (S.D. Ohio 1976); *see also Dryden v. Lou Budke's Arrow Finance Co.*, 630 F.2d 641 (8th Cir. 1980) (holding that an unenforceable transaction was an extension of credit). We agree with this rule because the regulation expressly refers *solely* to the consumer's commitment and because TILA's express purpose of protecting consumers from receiving inadequate disclosures prior to *their* entering into credit transactions could not otherwise be effectuated. If consummation, or extension of credit, does not encompass a consumer's commitment to a financing agreement that provides unilateral power for the creditor to execute the agreement later, creditors could intentionally provide faulty disclosures to consumers, obtain their commitment, and then afterwards provide accurate disclosures prior to closing the transaction, which if provided earlier might have dissuaded the consumer from accepting the credit, all without incurring TILA liability. As the *Bryson* court noted:

> [T]he point at which the consumer . . . commits himself or herself to the purchase of credit, without regard for the degree of commitment of the lender . . . [is the point at which] the consumer becomes vulnerable to actual damage from the lender's inadequate or deceptive disclosures, for at this time he or she can be contractually bound to the terms of the lending contract at the option of the lender.

Bryson, 584 F. Supp. at 1317 (emphasis added). Consequently, we conclude that consummation, or extension of credit, under § 1638 encompasses unfunded, financing agreement options to which consumers contractually commit, and under which they can be bound at the lender's sole discretion. Here, Nigh's signing of RISC II and his giving over of the signed documents to Koons Buick worked his commitment and constituted consummation, or an extension of credit. Thus, the district court properly concluded that liability attached "when Nigh made the choice and committed himself to the purchase of credit," *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535, 549 (E.D. Va. 2001).

Koons Buick next attacks its TILA liability by arguing that, since the second Buyer's Order Nigh signed has a line-item listing the Silencer product for a price of $965, RISC II's disclosures were accurate, and thus do not violate TILA. But, for several reasons this claim also fails. First, the dealership conceded from the outset of this action that the $965 charge was a mistake and thus, by necessary implication, that RISC II was inaccurate. *See* Field Affidavit, J.A. at 252 (owner and president of Koons Buick admitting that "[p]laintiff should not have been charged for a silencer" and explaining that as a result "a third [RISC] was prepared"); *see also* Defendant's Responses to Plaintiff's First Set of Requests for Admissions, J.A. at 817 ("Admit that a charge of $965.00 was included on the second Buyer's Order for a "silencer." *Admitted that the charge was included in error*." (emphasis added)). Indeed, it was on the basis of these admissions that Koons Buick argued on summary judgment that it was due judgment under the affirmative defense of 15 U.S.C. § 1640(c), a bona fide *error* defense available to creditors who show that their TILA error was not intentional, but was a good faith mistake.[1] Koons Buick also argued on these admissions of error that if §

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[1] The jury ultimately rejected this defense, finding that Koons Buick "intentionally includ[ed]" the Silencer charge.

1640(c) did not apply, then § 1640(b) did, which provides an affirmative defense for lenders who have timely made corrections to their TILA errors.[2] Having conceded by affidavit, admission, and legal argument that the Silencer line-item was in error, Koons Buick cannot now contend that it was not in error and thus that RISC II was accurate.

Second, Koons Buick waived the legal argument that the congruence between the Buyer's Order and RISC II proves that RISC II accurately disclosed the transaction by virtue of the fact that it makes the argument for the first time here in the Court of Appeals. Though Koons Buick asserts in its briefs that it raised this legal objection earlier in the proceedings, its assertion is unsupported by the record. The citation to which Koons Buick directs the court records its argument at the start of trial, and *after* the summary judgment proceedings were concluded. *See* J.A. at 317-20. And though that trial exchange contains Koons Buick's assertion that RISC II accurately disclosed the transaction by virtue of its congruence with the second Buyer's Order, it noted this objection *only in furtherance of its argument that the error in RISC II was an innocent error*:

> When a mistake was discovered in the buyer's order agreement, there was a new retail installment contract which changed the APR and lowered the APR. That's the kind of mathematical error, assuming this was a TILA violation to start with that the correction of errors was designed to address.
>
> . . . .
>
> So, to the extent to which it's a TILA violation—and I'm not quite even [sure] it's a TILA violation because the first—[RISC II] was accurate as to the deal that both parties

[2] The district court correctly rejected this defense because Koons Buick never notified Nigh of the error.

> mistakenly agreed to. And certainly, Mr. Nigh having signed it, is not in a position to later come back and say he was unfairly taken advantage of.
>
> *So, your Honor, we believe that in ruling that we're not entitled to the [§ 1640(b)] defense for correction of errors, that the Court is incorrect.*

(J.A. at 318-20).

Lastly, but equally fatal to Koons Buick's argument is the fact that the jury, after being properly instructed on the law, rejected Koons Buick's claim that the Buyer's Order provided a basis for RISC II's Silencer charge. We do not speculate as to the substance of a jury's factual determination, and only inquire whether sufficient evidence supported the verdict.

The verdict form read as follows:

> Do you find that Koons violated the Truth in Lending Act by intentionally including a charge for a "Silencer" on the Retail Installment Sales Contract signed on February 25, 2000 with knowledge that there was *no basis* for the charge?

(J.A. at 763) (emphasis added). The jury answered "Yes." *Id.* Having evaluated the exhibits and the testimony, the jury decided that the *apparent* congruity between the Buyer's Order and RISC II did not constitute a basis for RISC II's Silencer line-item. The jury's conclusion that there was no basis, from the Buyer's Order or any other document, for RISC II's Silencer line-item could well have been based on a determination that some portion of the transaction documents were unreliable, a determination supported by the record's disclosure that Nigh executed no "we owe" form for the Silencer and that HAFC noticed this unusual absence, *see* J.A. at 769, and by Mr. Nigh's testimony that he never noticed a charge for the Silencer when he signed the second Buyer's Order and RISC II, *see* J.A. at 479-82. The jury's finding of liability was sufficiently supported by this evidence.

Koons Buick's last challenge to the TILA judgment involves the court's application of the statutory damages cap that 15 U.S.C. § 1640(a)(2)(A) establishes for TILA liability. Koons Buick contends that the court erred in allowing statutory damages of twice the finance charge in connection with the transaction, citing *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983) (summarily interpreting § 1640(a)(2)(A) to cap TILA statutory damages in all individual actions at $1,000). Koons Buick's reliance on Mars is misplaced.

In 1983, when Mars was decided, the act read as follows:

> (a) . . . any [TILA violator] is liable to such person in an amount equal to the sum of—
>
> . . . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, *or* (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000[.]

§ 1640(a)(2)(A) (1980) (emphasis added). In 1995, however, Congress amended the act to read as follows:

> (a) . . . any [TILA violator] is liable to such person in an amount equal to the sum of—
>
> . . . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the

> liability under this subparagraph shall not be less than $100 nor greater than $1,000, *or* (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, *not less than $200 or greater than $2,000*[.]

§ 1640(a)(2)(A) (1995) (emphasis added).

The *Mars* decision plausibly interpreted the phrase "under this subparagraph" to apply to the whole of subparagraph (A) in 1983. But the 1995 amendment, by striking the "or" preceding (ii), and inserting (iii) after the "under this subparagraph" phrase, rendered *Mars'* interpretation defunct. Whereas in 1983 it was plausible to interpret the maximum and minimum provision as coming at the end of subparagraph (A), and not exclusively within subparagraph (ii), the new provision clearly places that clause wholly within (ii). Of even greater importance, the provision now expressly sets a statutory maximum and minimum in subparagraph (iii) that is different from that provided in the pre-existing maximum and minimum clause. The inclusion of the new maximum and minimum in (iii) shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii). As a consequence of the 1995 amendment, the damages that may be awarded under subparagraph (i) are now simply "twice the amount of any finance charge *in connection with the transaction*," and the court's instruction that if Koons Buick violated TILA Nigh was "entitled to twice the [entire] finance charge" was proper.

Judge Gregory's disagreement with this analysis is founded on the mistaken conclusion that we must conclude that Congress abrogated *Mars* in order to reach our decision here. *See post* at 131. Of course, when a statute has been amended we interpret the new statute, not the old, and any prior opinion

interpreting the old statute is necessarily brought before us for review so that we may ascertain whether the logic of that prior interpretation still applies to the new statutory language. Our responsibility is thus not to determine whether there is evidence that "Congress intended to override the Fourth Circuit's" precedent (or any circuit precedent for that matter), as Judge Gregory believes. *See post* at 131. The questions before this court, and that which we address above, are simply whether Congress amended the statute in a way relevant to the prior interpretation, and if it did, what does the amended statute mean.

Furthermore, though Judge Gregory thinks our analysis necessarily implies that Congress "changed the meaning of the word 'subparagraph,'" *see post* at 132, it does no such thing. As explained above, Congress' amendment requires that the reference point of the "under this subparagraph" clause be the subparagraph of § 1640(a)(2)(A)(ii), and not the subparagraph of § 1640(a)(2)(A). Indeed, it is Judge Gregory who would have this court change the meaning of the term "subparagraph," as his analysis would ignore the plain reading of that term and instead conclude that it was either meant in the plural, thus referencing subparagraphs (i) and (ii), or that it was a term of art not referencing a distinct subparagraph at all.

Judge Gregory's conclusion that our reading of the "under this subparagraph" clause creates surplusage in the statute's construction and "inconsistency" among its parts is equally flawed. *See post* at 132. Indeed, if the "under this subparagraph" clause had been omitted from the amended statute, Judge Gregory would have a much better case for his interpretation. Had that occurred, he could argue that Congress intended the maximum and minimum codified in (ii) to apply to both (i) and (ii), using a comma preceding the maximum and minimum to set it off from (ii) and to show its applicability to (i) and (ii), and not using language that requires identifying a distinct subparagraph to which to apply

the maximum and minimum. Thus, rather than being surplusage, the inclusion of the "under this subparagraph" clause not only enables, but actually compels, the reading we give the statute by applying the maximum and minimum limits to a distinct subparagraph.

Nor does the clause create "inconsistency" among the statute's parts either. Just because Congress did not use the same terminology to restrict the maximum and minimum in (iii) to that subparagraph as it did to restrict the maximum and minimum in (ii) to that subparagraph, it does not follow that "Congress must have meant the statutory caps . . . to have different applications," *see post* at 132. That fact leads only to the conclusion that the plain language of each must be interpreted individually to ascertain its meaning.

It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995. However, the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap regardless of its intent. It is the statute, not any inferential intent, that constitutes the law. Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent. In this way, and in this way only, are the constitutional roles of the legislature and the courts respected.

Koons Buick's last substantive attack on the district court's rulings involves the grant of summary judgment on its counterclaims. The dealership argues that the court erred by reversing, post-trial, its pre-trial grant of summary judgment with respect to installment payments owed by Nigh under RISC III. But the court did not err in this regard, because it

did not reverse itself. As the court made clear, the Supplemented and Final Judgment, filed after trial, did not change the court's pre-trial holding; it simply "clarifie[d]" it (J.A. at 894). Admittedly, in granting summary judgment on the counterclaims, the court held that Nigh breached his contractual obligations in three ways: 1) failing to pay off the excess loan balance on his trade-in, which exceeded his estimate; 2) failing to pay on the $2,000 Promissory Note; and 3) failing to make installment payments. But the court calculated damages to *Koons Buick* only for the first two. It found Koons Buick entitled to $1,959.73 for the excess pay-off amount, and $2,000.00 for the Promissory Note. The court *never* said Koons Buick was entitled to the installment payments Nigh failed to make to HAFC; it never calculated damages to Koons Buick from this breach; and it never concluded that Koons Buick was entitled to any award for it.

Koons Buick, meanwhile, asserts it is entitled to the $30,000 due under RISC III since the court found that Nigh breached his installment payment obligations, even though it sold those rights to HAFC and HAFC repossessed the Blazer upon Nigh's breach. The dealership argues it is entitled to damages for the breach because it was the *assignor* of the sales contract. *See Carozza v. Boxley*, 203 F. 673, 677 (4th Cir. 1913) (noting that either an assignor or an assignee can sue on a defaulted contract). It further argues that even if it may not recover under *Carozza*, it may recover on HAFC's rights in order to preclude its own liability under Va. Code § 8.01-13, which allows assignees to recover against assignors of defaulted writings.

Both contentions fail. Koons Buick's counterclaim pleading *nowhere* refers to either installment payments or its status as an assignor. *See* Koons Buick's Answer and Counterclaim (J.A. at 63). Thus, Koons Buick did not put Nigh or the court on notice that it was suing on the installment payments, or under any assignment based theory, as would have been required for it to recover on the breach. *See* Fed. R.

Civ. P. 8; *Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995) (a "pleaded claim [must] afford the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved") (citations omitted). Though the court found that Nigh breached his RISC III payment obligations, it made no award on this basis to Koons Buick, and Koons Buick, having failed to plead on this basis, was due no award. The Supplemented and Final Judgment properly clarified this point.

Koons Buick also appeals the VCPA judgment. That judgment, however, was supported by properly admitted evidence and was sufficient to establish that Koons Buick made material misrepresentations to Nigh. These misrepresentations were intended to deceive, did deceive, and caused loss; and the jury's verdict may not be set aside. Koons Buick lastly challenges the district court's rulings on both parties' motions for costs and attorney fees. Its objections are without merit; the court did not abuse its discretion in reaching cost and fee determinations.

B.

Nigh contends on his cross-appeal that the district court erred in granting summary judgment to Koons Buick on two claims. First, he argues that the court should have allowed him to proceed to trial on his TILA claims involving RISC III. Nigh submits that since RISC III, though signed on March 5, was back-dated to February 25, it resulted in interest being accrued as of February 25, and thus necessitated that TILA disclosures also be given as of that date. Since Nigh did not receive the disclosure documents for RISC III until March 5, he reasons that Koons Buick violated TILA and did not deserve summary judgment on the claim. Nigh's argument, though superficially clever, is without merit. While he was liable for monies *calculated* from February 25 on, he did not *become liable* for, those monies until March 5, by which point he had received the material disclosures. As Nigh himself

points out, "TILA required Koons to provide Nigh with [the] disclosures . . . prior to the consummation of the transaction," Appellee's Br. at 44, and "the parties did not sign [RISC III] until March 5, 2000," *id.* at 46.[3]

Nigh also argues that the court erred by rejecting his claim to be entitled to rescission under Va. Code § 46.2-1542 as a result of Koons Buick's allegedly untimely transfer of title. Though Nigh was given a temporary ownership certificate governed by § 46.2-1542 upon signing RISC I, Nigh and Koons Buick executed a reassignment of title within thirty days, validly transferring title before the statutory deadline and depriving Nigh of a claim to rescission. *See* J.A. at 778 (DMV records establishing that the title transfer date for the Blazer was February 25, 2000).

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

WILLIAMS, Circuit Judge, concurring in part and concurring in the judgment in part.

I concur in sections II and III.B of the majority opinion. I concur in section III.A of the majority opinion with the exception of that part of the majority opinion analyzing the issue of whether RISC II was inaccurate, *see ante* at 124 - 126. I agree that "Koons Buick waived the legal argument that the congruence between the Buyer's Order and RISC II proves that RISC II accurately disclosed the transaction," *ante* at 124,

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[3] Because Nigh only argued on appeal that the back-dating of RISC III caused its accompanying disclosures to be untimely, we do not properly have before us the related question, addressed by the district court in *Rucker v. Sheehy Alexandria, Inc.*, 228 F. Supp. 2d 711 (E.D. Va. 2002), of whether such back-dating might affect the accuracy of the accompanying disclosures.

and thus, I concur in the judgment as to this part and would not reach the analysis of this issue.

GREGORY, Circuit Judge, concurring in part and dissenting in part.

I.

I write separately to dissent solely from the Court's reading of 15 U.S.C. § 1640(a)(2)(A)(1998). I would find that Congress, with the 1995 amendments to TILA, did not change the application of the $1,000 cap in § 1640(a)(2)(A)(ii). Because the cap still applies to (2)(A)(i), I would find that the district court erred in granting Nigh damages in excess of that statutory limit.

II.

On appeal, Koons argues that the district court improperly instructed the jury on the measure of damages for Nigh's claim under TILA. The district court informed the jury that, pursuant to TILA, damages were to be equal to "twice the amount of any finance charge in connection with the transaction." § 1640(a)(2)(A)(i); J.A. at 764. Based on this instruction, the jury awarded Nigh $24,192.80 on his TILA claim. Koons insists that the $1,000 statutory cap in § 1640(a)(2)(A)(ii) applies to the calculation of damages under (2)(A)(i), and that the district judge should have reduced the award accordingly.

Before the 1995 amendments to TILA, 15 U.S.C. § 1640(a) read, in pertinent part, as follows:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—. . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action

relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1000; or

(B) in the case of a class action, such amount as the court may allow, except that . . . the total recovery *under this subparagraph* . . . shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor . . . .

15 U.S.C. § 1640(a)(1994) (emphasis added). That is, subparagraph (A) concluded with the qualification that "liability under this subparagraph shall not be less than $100 nor greater than $1,000." Both parties concede—and it is Fourth Circuit law—that this limitation applied to the entire subparagraph, both subsections (2)(A)(i) and (2)(A)(ii). *See Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65, 67 (4th Cir. 1983). *See also Strange v. Monogram Credit Card Bank of Ga.*, 129 F.3d 943, 947 (7th Cir. 1997) (citing *Mars*).

This reading of the statute was buttressed by the use of the same "under this subparagraph" language in § 1640(a)(2)(B), which stated (and still states), "[T]he total recovery *under this subparagraph* . . . shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." (Emphasis added). The plain reading of the pre-1995 statute was that there was one statutory cap on damages under subparagraph (B) and a separate cap under subparagraph (A). The use of the phrase "under this subparagraph" in relation to both limits made it clear that the caps were applicable to the whole of their respective subparagraphs. This was the reading of the statute adopted by the *Mars* Court, and it is an interpretation by which this panel is still bound.

In 1995, however, Congress amended the statute to add (2)(A)(iii), relating to real estate transactions. The current statute reads, in relevant part:

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2000 . . . .

15 U.S.C. § 1640 (1998) (emphasis added). The 1995 amendments did not include any wholesale changes to the statute; the newly drafted third clause was simply tacked on to the end of the subparagraph. Still, with the addition of (2)(A)(iii), the phrase "under this subparagraph" cannot apply to all of (2)(A) as Congress initially intended, because it does not apply to (iii), which has its own cap of $2,000. Thus, the question before this Court is whether Congress meant to change the application of the statutory cap, and thus abrogate *Mars v. Spartanburg Chrysler Plymouth* by adding (2)(A)(iii) to the statute.[1]

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[1] The majority claims that its holding is supportable without concluding that *Mars* has been abrogated because the 1995 amendments present this Court with a "new statute" that was not before the *Mars* Court in 1983. *Ante*, at 127. The Court explains, "The *Mars* decision *plausibly* interpreted the phrase 'under this subparagraph to apply to the whole of subparagraph (A) in 1983. But the 1995 amendment . . . rendered *Mars'* interpretation defunct." *Ante*, at 126 (emphasis added). As a preliminary matter, I have trouble understanding the material distinction between a congressional act that renders a court's interpretation defunct and an act that abrogates that same interpretation. Regardless, the amendments do not create a new statute, but simply append a third clause to the original law. Thus, to reach its result the majority must either: (1) overrule *Mars* (which it cannot do); or (2) find that *Mars* has been abrogated. The majority effectively recognizes this fact when it states that the "prior [*Mars*] opinion . . . is necessarily brought before us for review so that we may ascertain whether

I would find that *Mars* is still good law because there is no evidence that Congress intended to override the Fourth Circuit's long-standing application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii). The Seventh Circuit, the only Circuit outside of our own to interpret the amended statute, has explained:

> One could argue that § 1640(a)(2)(A)(i) and (ii) are separate "subparagraphs," and that "liability under this subparagraph" means only liability under § 1640(a)(2)(A)(ii). Although that reading has a certain appeal . . . *the history of this part of the statute suggests that such a reading has its own problems*. Until 1995, § 1640(a)(2)(A) had only two subsections, the present (i) and (ii). *Courts uniformly interpreted the final clause, which established the $100 minimum and the $1,000 maximum, as applying to both (A)(i) and (A)(ii).*

Strange, 129 F.3d at 947 (emphasis added).[2]

Disregarding the Seventh Circuit's well-reasoned analysis, the majority elects to create a circuit split, reasoning that the addition of (2)(A)(iii) has changed the meaning of the word

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the logic of that prior interpretation still applies . . . ." *Ante*, at 127.

[2] Similarly, one scholar has observed:

> [Congress] added the real estate limitation without changing the word "subparagraph." That lapse should not lead to a restriction of liability solely as to part (ii) because that would be a significant change that would require the word "subparagraph" to be applied only to part (ii), when that has always been applied to everything included in subparagraph (A).

Elwin Griffith, *Searching for Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 Baylor L. Rev. 265, 305 (2000). As a result, Professor Griffith concluded, "Congress did not change its mind about the meaning of that word, but instead neglected to make the necessary adjustment when it added a third part to accommodate transactions secured by real estate." *Id.*

"subparagraph" in (2)(A)(ii). Finding that a new reading of "subparagraph" is necessary, the majority states, "The inclusion of the new maximum and minimum in (iii) shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii)." *Ante*, at 126 - 127.

If the $1,000 cap was intended to apply only to (ii), however, then the inclusion of the phrase "under this subparagraph" would be superfluous; the meaning of (ii) would be unchanged by its deletion. It is, of course, a well-recognized rule of statutory construction that courts should "avoid a reading [of a statute] which renders some words altogether redundant." *Lane v. United States*, 286 F.3d 723, 731 (4th Cir. 2002) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)). Therefore, a reading of § 1640 making the phrase "under this subparagraph" meaningless should be disfavored.

Even more, to limit the $1,000 cap only to (2)(A)(ii) would create an inconsistency within the statute. The $2,000 cap in (2)(A)(iii) applies only to that individual clause, even though there is no phrase limiting its effect to one "subparagraph." If Congress also intended to limit the reach of the statutory cap in (ii), then it would have either deleted the words, "under this subparagraph" from (ii), or included the phrase in both (ii) and (iii). By declaring that the statutory cap in (ii) should apply to claims "under this subparagraph," but not similarly qualifying the cap in (iii), Congress must have meant the statutory caps in those two clauses to have different applications.

This reading is made even more compelling when one considers that the phrase "under this subparagraph" in § 1640(a)(2)(B) indisputably applies to all of subparagraph (B). Similarly, the statutory cap following (2)(A)(ii) applies to all claims under subparagraph (A), with the exception of claims under (2)(A)(iii), which contains its own, discrete limit. In

short, the most logical interpretation of the statute is to read the phrase "under this subparagraph" as applying generally to an entire subparagraph, either (A) or (B), and to read (2)(A)(iii) as creating a specific carve-out from that general rule for real-estate transactions.

This is the reading that has been adopted by the Seventh Circuit:

> [T]he 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A). We therefore conclude that the "subparagraph" mentioned in § 1640(a)(2)(A)(ii) continues to encompass what is now codified as subparts (A)(i) and (A)(ii), and not just subpart (A)(ii).

Strange, 129 F.3d 943, 947 (7th Cir. 1997). When Congress added § 1640(a)(2)(A)(iii), it included a $2,000 cap specifically for (iii), but left the older $1,000 cap unchanged. The qualifier, "under this subparagraph," remained. Thus, I would hold that the addition of (2)(A)(iii) did not alter the meaning of (2)(A)(i) or (2)(A)(ii). To hold otherwise would be to dramatically increase creditors' liability exposure under § 1640(a)(2)(A), without any explicit, statutory language to support such an increase.

III.

In sum, I concur with the majority's assessment that Koons engaged in a variety of scurrilous business practices that support the jury's finding of liability under both TILA and the VCPA. However, for the reasons articulated above, I believe that Koons' statutory liability for its TILA violation is capped at $1,000. Accordingly, I dissent in part from the majority's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BRADLEY NIGH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 00-1634-A
KOONS BUICK PONTIAC	)	
GMC, INC. and	)	
HOUSEHOLD	)	
AUTOMOTIVE FINANCE	)	
CORPORATION,	)	
	)	
Defendants.	)	

SUPPLEMENTED AND FINAL JUDGMENT

THIS MATTER is before the Court on Defendant Koons Buick Pontiac GMC, Inc.'s ("Koons") Motion to Enter Final Judgment. The issue before the Court is whether Koons is entitled to the $30,000 in installments payments specified in the sales contract for the Truck that Plaintiff Bradley Nigh purchased. The Court holds that Koons is not entitled to the $30,000 in installment payments. Koons cannot assert its entitlement to the installment payments at this stage in the litigation because Koons' pleadings did not put Nigh or the Court on notice that Koons sought this amount in damages. Regardless, Koons is not entitled to the payments under Virginia law because Koons could not sue on the sales contract since Koons divested itself of all legal rights and title to the Truck and the credit contract when it assigned the Truck's credit contract to Defendant Household Automotive Finance Corporation. For these reasons, the Court

supplements its judgment and enters final judgment as set forth below.

I. BRIEF BACKGROUND

Defendant Koons filed a motion for summary judgment in this case on March 29, 2001. Koons moved for summary judgment on Counts II through V of its Counterclaims. The Court granted in part Koons' motion for summary judgment on April 20, 2001. The Court granted judgment for Koons on Koons' claim for damages in the amount Koons paid exceeding Plaintiff Nigh's estimate of the lien on Nigh's trade-in, and on the amount Koons had to pay to retrieve the trade-in, totaling $1,959.73. The Court also granted judgment for Koons on Koons' breach of contract claim asserting that Nigh failed to make installment payments for the purchase of the Truck and failed to pay off the additional $2,000 down payment owed on the promissory note.

Koons asserts in error that it is entitled to a judgment that includes $30,000 for the installment payments specified on the sales contract that Nigh signed. Koons' error stems from a lack of clarity in the Court's April 20, 2001 Opinion. The Court clarifies that holding at this time.

In holding that Nigh breached his contract by failing to make installment payments, the Court did not hold that Nigh was liable to Koons for the full amount of the total installments specified on the contract regardless of whether Koons had been paid full consideration for the contract. In ruling on Koons' motion for summary judgment, the Court recognized Count III of Koons' counterclaim as a breach of contract claim and simply held that Nigh did, in fact, breach his contract in two respects: (1) he failed to pay back the $2,000 promissory note, comprising the additional down payment amount, and (2) he failed to make installment payments. In granting summary judgment for Koons, the Court held that Koons was entitled to the damages that Koons sustained as a result of Nigh's breach of contract. The Court

did not conceive of the possibility that Koons sought a double recovery from the simple statement of damages that "Koons demands damages for breach of contract plus interest." (Answer and Counterclaims ¶ 26.) Koons is not entitled to recover under the sales contract twice.

The Court's holding in its April 20, 2001 Opinion was limited to a finding that Nigh was bound by the contract and, therefore, breached the contract in failing to make installment payments. Koons sold the value of the contract to another party, thereby making Nigh liable for the value of the Truck to the party who purchased the sales contract for value, not to Koons. (Pl. Statement of Material Facts not in Dispute, Ex. D[1]: Contract Registration (indicating that HAFC was the lien holder for the Truck).) Moreover, Nigh is liable only to the extent of the value of the sales contract that exceeds the value the purchaser of the sales contract received for the Truck. Thus, because Koons sold Nigh's finance agreement to Household Automotive Finance Corporation ("HAFC"), HAFC holds Nigh's contract. (*Id.*) Because HAFC then sold the Truck for value, but received less than the total that Nigh owed on the credit contract, HAFC could recover only an amount in installment payments that exceeded what HAFC received when it sold the Truck. (Pl. Statement of Material Facts, Ex. P: Notice of Deficiency (indicating that HAFC sold the Truck for $12,300 and demanded from Nigh $6,534.96 for the deficiency on the credit contract).) Moreover, HAFC's recovery is dependent on HAFC's filing for a claim for such amount.

II. PARTIES' CONTENTIONS

Koons argues that it is entitled to the full $30,000 in installment payments that Nigh would have paid over the life of the sales contract. (Pl. Statement of Material Facts, Ex. H:

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[1] This citation references Plaintiff's second exhibit labeled as "Exhibit D" for this pleading.

Sale Invoice (indicating that, after paying the $6,000 down payment, purchaser Nigh would make 60 payments over five years, totaling $30,000).) This argument is based on Koons' tardy, post-trial assertion that Koons counter-sued Nigh in its role as the assignor of the sales contract. Koons argues that either an assignor of a contract or the assignee can sue for payment on a delinquent contract. *See Carozza v. Boxley*, 203 F. 673, 677 (4th Cir. 1913). Koons further argues that it has a right to sue on the contract that it assigned to Defendant HAFC because Koons is potentially liable to HAFC for Nigh's failure to pay HAFC. *See* VA. CODE ANN. § 8.01-13 (Michie 2000) (stating that an assignee can recover against any assignor of a writing); § 8.01-281 (stating that a claimant can bring a claim based on future potential liability); *Jones v. Hyatt*, 38 Va. Cir. 140 (1995) (holding that the plaintiff could bring a claim for future potential liability, which might include future payments he was required to make because of his lawyer's malpractice).

In opposition, Nigh argues that the Court should not permit Koons to assert at this late date that Koons brought its counterclaims in the assignor role because Koons did not plead as much. *See* FED. R. CIV. P. 8(a) (stating that a claimant must state its claim to alert the defendant of the claimant's asserted bases for relief). Nigh further argues that Koons cannot sue on the contract that Koons assigned to HAFC because Koons was required to plead a set-off regarding the value for which Koons sold the Truck. *See* FED. R. CIV. P. 8(c). Also, Nigh argues that Koons cannot sue on the contract because Koons no longer holds the contract; HAFC holds it. Nigh notes that HAFC was a party to this action and never sought to enforce the right to payments on the contract. Nigh asserts that Koons cannot seek now to enforce that right.

III. DISCUSSION AND HOLDINGS

The Court holds that Koons cannot assert at this stage in the litigation that it sued on the sales contract as the assignor of the contract. Rule 8 of the Federal Rules of Civil Procedure requires a statement of a claim sufficient to put the opposing party on notice of the basis of the claimant's claim. *See Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that all that is necessary is a plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests). Koons' pleadings put neither the Court nor Nigh on notice that Koons sought the entire value of the installment payments. Koons plead in Count 3 of its Counterclaim that it sued Nigh for breach of contract. (Answer and Counterclaims ¶¶ 25-26.) Koons sued Nigh for breach of the Buyer's Order agreement dated February 25, 2000. The Buyer's Order incorporated the third Retail Installment Sales Contract by referring to the terms of "future agreements." However, nowhere in Koons' Counterclaims—or any successive pleading, such as Koons' motion for summary judgment—did Koons assert that it sued on the contract in its role as assignor of the contract. In light of the parties' disclosures that Koons assigned the sales contract to HAFC, and that HAFC paid Koons value for the Truck, there was no notice that Koons meant to sue for the full value of the Truck. Therefore, Koons did not meet the notice pleading standard of Rule 8, liberal though that standard is. Neither Nigh nor the Court was on notice of Koons' asserted legal and factual basis of Koons' claims, and, therefore, the Court's April 20, 2001 holding did not confer judgment upon Koons for the $30,000.

The Court further holds that even if Koons had pled properly that it sought to sue as the assignor of the sales contract, Koons could not prevail on the full value of the contract on that basis. Koons may not sue for the $30,000 value of the sales contract because it assigned all of its rights

to payment on the contract to HAFC. *See Rodriguez v. Compass Shipping Co.*, 617 F.2d 955, 960-61 (2d Cir. 1980) (involving statutory assignment), *affirmed*, 451 U.S. 596 (1980); *Burns v. Cities Svc. Co.*, 217 S.E.2d 56, 58 (W. Va. 1975) (noting that all jurisdictions have held that the unconditional assignee, and not the assignor, is the real party in interest who must bring the action); CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1545, at 351 (West 1990) ("When all rights to a claim have been assigned, courts generally have held that the assignor no longer may sue.") Among the documents that demonstrate that Koons assigned all of its rights to title and payments to HAFC is the Notice of Deficiency that HAFC sent to Nigh on August 15, 2000 and the Department of Motor Vehicle's Certificate of Title for the Truck. (Pl. Statement of Material Facts, Ex. P: Notice of Deficiency; Def. Opp'n to Pl. Mot. for Summ. J., Ex. 3: DMV Certificate of Title.) The Certificate of Title lists Nigh as the owner of the Truck and HAFC as the lien holder; Koons is not recognized anywhere on the Certificate. The Notice of Deficiency demonstrates that HAFC obtained by assignment full legal title of the Truck and full rights to payment thereon because the Notice indicates that (1) after the assignment, Nigh's contract was with HAFC; (2) HAFC repossessed the Truck from the Koons lot[2]; (3) HAFC sold the Truck for value; and (4) HAFC claimed a deficiency from Nigh based on Nigh's failure to pay on the credit contract. The acts undertaken by HAFC demonstrate that HAFC holds the right to sue on the sales and credit contracts. Under Rule 17(a) of the Federal Rules of Civil Procedure, an action must be brought in the name of the party who possesses the substantive right being asserted under the

[2] Nigh declared that he left the Truck on the Koons lot. (Pl. Statement of Material Facts, Ex. O: Declaration of Bradley Nigh ¶ 6.) The fact that HAFC repossessed the Truck although it was in Koons' possession, and no longer with Nigh, indicates that, after the assignment, Koons no longer had even the right to possess the Truck.

applicable law. FED. R. CIV. P. 17(a); *see also Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973) (stating that the reason behind Rule 17 is that an action be brought by a person who possesses the right to enforce a claim and who has a significant interest in the litigation); *Doherty v. Mutual Warehouse Co.*, 245 F.2d 609 (5th Cir. 1957); *Kenrich Corp. to Use of Kline v. Miller*, 256 F. Supp. 15 (D.C. Pa. 1966), *affirmed on other grounds*, 377 F.2d 312 (3d Cir. 1967). Suit by the real party in interest enables the defendant to present its defenses and ensures that the judgment will have proper res judicata effect. *See Virginia Elec. & Power Co.*, 485 F.2d at 84 (citing Rule 17). In this case HAFC, not Koons, was the real party in interest on a claim for the installment payments. Suit by Koons alone would have subjected Nigh to future litigation by HAFC, the party that held the credit contract. Thus, Koons could not sue for the installment payments because it assigned the right to demand payment on the contract to HAFC. *See Vance v. Maytag Sales Corp.*, 165 S.E. 393, 396 (Va. 1932) (indicating that the action had to be brought by the assignee, who was the real party in interest, and, therefore, the assignor could not sue).

Koons' dependence on *Carozza v. Boxley* for Koons' position that Koons can sue to enforce installment payments on the sales contract is misplaced. Koons cites *Carozza* for the proposition that an assignor retains a right to sue after the assignment has been made. *See* 203 F. at 676-77. The *Carozza* court did so hold, but under different circumstances. The *Carozza* court held that the assignor could still sue on the contract even after assignment because, in *Carozza*, all legal title remained in the assignor after the assignment. *See id.* at 676. In *Carozza*, a subcontractor contracted with a contractor to perform construction work for payment. The subcontractor then assigned to its creditors the right to be paid from the contractor. The *Carozza* court noted that the assignment in *Carozza* was only a partial assignment, meant to pay the

subcontractor-assignor's creditors. *See id.* at 677. After the creditors were paid in full, the assignor retained legal title to payments on the original construction contract. Therefore, the creditors-assignees obtained only equitable rights to payment, while the assignor retained legal rights and title in the contract. *See id.; see also Bentley v. Standard Fire Ins. Co.*, 23 S.E. 584, 585 (Va. 1895) (stating that a first assignor could not sue in his own name because he passed legal title to his assignee, but that a second assignor could still bring suit in his own name because the second assignor passed only equitable title and retained legal title). *Carozza* is not controlling here because Koons' situation differs from the assignor in *Carozza*.

Koons may not sue to enforce Nigh's obligation under the contract because Koons transferred fully its rights under the sales contract. An assignor, to the extent it has divested itself of ownership or title, loses all right to enforce a claim on an assigned contract. *See Sweeney v. Foster*, 71 S.E. 548, 549-50 (Va. 1911); *Vance*, 165 S.E. at 396; *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 924 (2d Cir. 1977); *C.C. James Roofing Co. v. Regent Theater Co. of Grand Rapids*, 211 N.W. 85, 85-86 (Mich. 1926). *Cf. Continuous Zinc Furnace Co. v. American Smelting & Refining Co.*, 61 F.2d 958, 959 (2d Cir. 1932) (assignor could maintain cause of action separate from that of assignee because assignor made only a partial assignment). HAFC held full legal title for payments from Nigh. Thus, Koons could not sue on rights assigned to HAFC.

Moreover, assignee HAFC was not a mere collection agent for Koons. Koons has informed the Court that HAFC paid Koons in full for the value of the Truck; so HAFC would have legal title in the money HAFC collected from Nigh. Thus, Koons' assignment to HAFC was not a partial assignment or an assignment for collection, whereby the assignment would have left beneficial ownership of the contract, and payments thereon, with Koons. *See, e.g., Rouse v. Archer*, 131 A. 753 (Md. 1926) (stating that partial assignee of a mortgage held

the mortgage in trust for the assignor); *Hipp v. Spencer*, 109 P. 1109, 1109-10 (Colo. 1910) (holding that assignee for collection was entitled to only a small share of the fee collected for satisfaction of a debt, and assignor was entitled to the balance); *McFadden v. Swinerton*, 59 P. 816, 820-21 (Or. 1900) (involving an assignment of claims for collection where the assignors retained the right to receive the majority balance on the recovery). Therefore, Koons could not maintain an action for full payment on the installment payments because it made an absolute assignment of the payments to HAFC. *See, e.g., Sweeney*, 71 S.E. at 550; *Burns*, 217 S.E.2d at 58-60 (applying the same "real party in interest" rule to the assignment context as Virginia); *Young v. Willing*, 2 U.S. 276, 277, 1 L.Ed. 380, 380 (Pa. 1797).

Furthermore, Koons did not effectively sue for the full $30,000 value *on behalf of* HAFC. If Koons sought in its counterclaims to assert on behalf of HAFC the rights that HAFC had under the assigned contract, then HAFC was an indispensable party to the counterclaims. *See Sweeney*, 71 S.E. at 550-51; *Hurt v. Miller*, 27 S.E. 831, 832-33 (Va. 1897). As such, Koons was required to join HAFC to the counterclaims suit under Rule 19. *See* FED. R. CIV. P. 19. HAFC was not a party to the counterclaims, so Koons did not countersue on HAFC's behalf.

Koons argues as an alternative to its argument that it could sue in its own right for the $30,000, as assignor of the sales contract, that it was entitled to sue for the $30,000 under Virginia Code § 8.01-281 because of Koons' potential liability to HAFC. Koons asserts that it is potentially liable to HAFC for $30,000 because Nigh defaulted on his payment contract with HAFC. Koons' argument fails for two reasons: (1) Virginia courts have not interpreted § 8.01-281 to permit an individual to sue a party on the off-chance that the individual may be sued by a third-party, especially where the third-party has not filed a claim against the individual; and (2) it is unlikely that Koons would be liable to HAFC for

$30,000 because HAFC recouped some of the value of the credit contract by re-selling the Truck.

Koons could not sue for the $30,000 on the basis that HAFC might bring a claim against Koons for that amount. Koons relies on Virginia Code § 8.01-281, which provides that a party asserting a claim can plead alternative facts and theories of recovery against alternative parties, provided that the joined claims arise out of the same transaction or occurrence. The section further provides that the claim may be for contribution, indemnity, subrogation, or contract, express or implied, and that "it may be based on future liability." VA. CODE ANN. § 8.01-281(A). Finally, the section states that it shall be no defense to the claim based on the future liability that the claimant "has made no payment or otherwise discharged any claim as to him arising out of the transaction or occurrence." *Id.* Virginia courts have made clear that this section is a procedural device for the sake of judicial economy. *See Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp.*, 360 S.E.2d 342, 344 (Va. 1987) (stating that *Wingo v. Norfolk & W. Ry.* properly interprets the statute and Virginia law); *In re FELA Asbestos Litigation, Wingo v. Norfolk & W. Ry.*, 638 F. Supp. 107, 114 (W.D. Va. 1986), *reversed on other grounds*, 834 F.2d 375 (4th Cir. 1987) (hereinafter "*Wingo*"); *Pilkington v. NVC of Vienna*, 1999 WL 1499537, *3 (Va. Cir. Ct. 1999). Usually, a claim for indemnity or contribution does not accrue until the time of the indemnitee's/contributee's injury, *see Gemco-Ware*, 360 S.E.2d at 344; *Wingo*, 638 F. Supp. at 114; the injury accrues when the indemnitee/contributee seeking relief has paid more than its share of an obligation, *see Virginia Int'l Terms, Inc. v. Ceres Marine Terms, Inc.*, 879 F. Supp. 31, 32 (E.D. Va. 1995). Absent § 8.01-281, a defendant who need not bear the full burden of liability for a plaintiff's claim would not be able to file a cross-claim or a third-party claim for indemnity, but would have to wait until it had paid on the judgment before it could bring a claim for indemnity or

contribution. Section 8.01-281 is meant to permit a party having a claim for indemnity or contribution to bring its claim within a pending lawsuit, before the indemnity or contribution claim has accrued. *See Virginia Int'l Terms, Inc.*, 879 F. Supp. at 32. The statute anticipates that a party bringing a claim based on potential liability has actually had a claim filed against it. *See* VA. CODE § 8.01-281 (indicating that a party may bring a claim based on potential liability even though the party has not yet discharged the liability on *the claim filed against it*). Koons' claim against Nigh does not fit into this context. This is not a situation in which HAFC brought a claim against Koons and Koons, in turn, sued Nigh for contribution or indemnity within the pending lawsuit. Instead, Koons asserts that it sued Nigh on the unfulfilled possibility that HAFC would sue Koons. Virginia law does not generally permit claimant's to bring claims for damages where no damages have been sustained. In this case, Koons could not sue Nigh for damages via Koons' counterclaims where HAFC had not even filed a claim against Koons from which damages could flow. Therefore, Koons' argument that it is entitled under § 8.01-281 to $30,000 for "potential liability" fails.

Koons' reliance on *Jones v. Hyatt* for the proposition that Koons can recover for possible future liability is misplaced. *See* 38 Va. Cir. 140 (1995). Cases from Courts higher than *Jones* have held that § 8.01-281's potential liability clause is merely a means to promote judicial economy and does not alter the settled rules on the accrual of a cause of action. *See Gemco-Ware*, 234 Va. at 344; *Wingo*, 638 F. Supp. at 113; *Pilkington*, 1999 WL 1499537 at 3. The Fourth Circuit has noted its belief that Virginia's highest court would reject *Jones v. Hyatt*. *See McCoubrey v. Kellogg, Krebs & Moran*, 246 F.3d 666, 2001 WL 326709, *4-5 (4th Cir. 2001) (unpublished opinion interpreting *Jones v. Hyatt, Gemco-Ware, Pilkington, Wingo*, and § 8.01-281). Therefore, this Court does not defer to the circuit court's ruling in *Jones* regarding potential liability claims.

Another *Jones v. Hyatt* case demonstrates that Koons' claim for potential damages cannot lie. *See* 681 So. 2d 381 (hereinafter "*Jones II*"). In *Jones II*, the Fourth Circuit permitted a prevailing plaintiff to recover for future medical expenses. However, in that case, the court awarded expenses as damages on an existing claim for an injury already sustained. The *Jones II* court did not permit a claimant to recover for a future claim or recover damages that had not yet been sustained. In fact, the *Jones II* court explicitly held that the plaintiff could *not* recover a damages award based on the mere "possibility" that the plaintiff would incur future expenses. *See Jones II*, 681 So. 2d at 389, 393 (holding that an award for future medical expenses had to be supported by medical testimony and an estimation of probable costs, and that testimony that it was a "possibility only" that the plaintiff would need future surgery was insufficient to award costs for a future surgery). Koons bases its claim to the installment payments on the "possibility only" that Koons will be liable to HAFC for Nigh's default. Koons' potential for liability is not supported by any evidence. There is no indication that HAFC had filed any claim against Koons at the time Koons pressed its countersuit. Therefore, Koons' assertion that it is entitled to the value of the installment payments for Koons' potential future liability is unpersuasive.

Koons' argument that it has "possibility only" in the amount of $30,000 also fails because HAFC would have only been able to sue Koons for the value of the Truck sales contract that HAFC was unable to recoup from the sale of the Truck. Under Virginia Commercial Code § 8.9-504, HAFC could sell, lease, or otherwise dispose of the Truck and use the proceeds to satisfy Nigh's indebtedness. *See* VA. CODE ANN. § 8.9-504(1) (Michie 1991)[3]; *see also Garcia Enters., Inc. v. Enterprise Ford Tractor, Inc.*, 480 S.E.2d 497, 500

[3] Section 8.9-504 was repealed effective July 1, 2001, but this was the applicable Code section at all times relevant to this suit.

(Va. 1997) (stating that a secured creditor can take possession of and sell secured property when a default occurs). At the hearing on Koons' motion for final judgment, Koons reported that HAFC repossessed the truck from the Koons lot and then sold it. This is supported by the Notice of Deficiency. (Pl. Statement of Material Facts in Dispute, Ex. P.) HAFC sold the Truck for $12,3000, but did not receive the full value of the Truck credit contract. The sale left a deficiency of $6,534.96, consisting of the balance on the credit contract, accrued interest, repossession and legal fees, and sales expenses. (*Id.*) Therefore, the amount of Koons' "future potential liability" is not the $30,000 Koons now seeks, but more closely approximates $6,500; and Koons' liability for even this amount is not automatic.

After HAFC's disposal of the Truck to satisfy Nigh's debt, Nigh is liable for the remaining deficiency. *See* VA. CODE ANN. § 8.9-504(2). If HAFC attempts with due diligence to recover the deficiency from Nigh but is still unable to do so, only then can HAFC resort to suit against Koons. *See Daniel v. Yearick*, 46 S.E.2d 333, 404-05 (Va. 1948); *Payne v. Huffman*, 36 S.E. 476, 477 (Va. 1900). Except in special circumstances,[4] suit against the obligor is generally necessary to show an assignee's diligence. *See, e.g., Caton v. Lenox*, 26 Va. 31, 1827 WL 1192, *1 (1827). *But see Mackie v. Davis*, 2 Va. 219, 1796 WL 617, 5, 6, 8-9 (1796) (holding that the assignee had exercised due diligence by making demand upon

[4] Examples of special circumstances where suit is not necessary are (1) the document making the assignment was a forgery and the assignor has received the money from the assignee; (2) the assignor practiced a fraud upon the assignee; (3) exchange notes were given between an obligor and an assignor, as a consideration for each other, and the assignor has not ever paid on the note the assignor gave, nor has the assignor's note been sued upon, etc. *See Caton*, 26 Va. 31, 1827 WL 1192 at 1. Another circumstance which would excuse an assignee from first bringing suit against an obligor is the obligor's insolvency, and the assignee's knowledge of that insolvency. *See Payne*, 36 S.E. at 477.

the obligor for payment, without bringing suit against the obligor). At the time that Koons brought its countersuit against Nigh, Koons presented no argument or evidence to the Court that HAFC had sued Nigh for defaulting on the assigned contract. Consequently, there has been no indication that HAFC was or is in a posture to sue Koons. Therefore, Koons' argument that Koons, as assignor to HAFC, will be liable to HAFC for Nigh's default is unavailing. Notwithstanding, the amount of Koons' liability would approximate only $6,534.96. Thus, the Court finds Koons' post-trial claim for the $30,000 for Koons' "potential liability" to be without merit.

IV. FINAL JUDGMENT

For the reasons stated above, the Court holds that Koons is not entitled to judgment in the amount of $30,000 for its breach of contract counterclaim. Therefore, the Court renders the following final judgment. This judgment incorporates the April 21, 2001 judgment on Defendant Koons' motion for summary judgment, the May 1, 2001 judgment on Plaintiff Nigh's motion for summary judgment, and recognizes the May 3, 2001 Judgment rendered by the Clerk after the jury verdict in this case. Accordingly, it is hereby

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count I of the Complaint, *except* on the claim asserting that Defendant Koons violated the technical aspects of the Federal Odometer Act with the intent to defraud the Virginia Department of Motor Vehicles;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of the Defendant Koons, and against Plaintiff Nigh, on the remaining claim in Count I of the Complaint, finding that Koons did not violate the Federal Odometer Act by committing technical violations with the intent to defraud the Virginia Department of Motor Vehicles;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count II of the Complaint;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count III of the Complaint, *except* on the claim asserting that Koons violated the Truth in Lending Act by charging Nigh for a silencer on the February 25, 2000 Retail Installment Sales Contract;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of Plaintiff Nigh, and against Defendant Koons, on Count III of the Complaint, finding that Koons violated the Truth in Lending Act by charging Nigh for a silencer on the February 25, 2000 sales contract;

ORDERED that JUDGMENT IS ENTERED in favor of Plaintiff Nigh, and against Defendant Koons, in the amount of $24,192.80 for Koons' violation of the Truth in Lending Act;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count IV of the Complaint;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count V of the Complaint, *except* on the claim asserting that Koons violated the Virginia Consumer Protection Act by representing to Nigh that Koons considered the vehicle that it sold to Nigh stolen absent Nigh's signature on the March 5, 2000 sales contract;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of Plaintiff Nigh, and against Defendant Koons, on Count V of the Complaint, finding that Koons violated the Virginia Consumer Protection Act by misrepresenting to Nigh that Nigh's possession of the vehicle was illegitimate if Nigh did not return to the dealership to sign a new sales contract;

ORDERED that JUDGMENT IS ENTERED in favor of Plaintiff Nigh, and against Defendant Koons, in the amount of $4,000.00 for Koons' violation of the Virginia Consumer Protection Act;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of Defendant Household Automotive Finance Corporation, and against Plaintiff Nigh, on Count V of the Complaint, finding that Household Automotive Finance Corporation was not liable under the FTC Holder Rule for Koons' violation of the Virginia Consumer Protection Act;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Counts VI, VII, VIII, IX, X, XI, and XII of the Complaint;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Household Automotive Finance Corporation ("HAFC"), and against Plaintiff Nigh, on Counts I, VI, VII, VIII, IX, X, XI, and XII of the Complaint (HAFC can not be liable under the FTC Holder Rule where Koons is not liable);

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant HAFC, and against Plaintiff Nigh, on Count XIII because HAFC can not be liable for breach of contract under the FTC Holder Rule where Koons is not liable for breach of contract (the Court has found in favor of Koons for the breach of contract claim alleged against Koons in Count IX);

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on Counts I, II and III of Koons' Counterclaim. Therefore, it is hereby

ORDERED that JUDGMENT IS ENTERED in favor of Defendant Koons, and against Plaintiff Nigh, in the amount of $2,000 plus interest under Counterclaim Count I for Nigh's failure to pay on the February 25, 2000 promissory note;

ORDERED that JUDGMENT IS ENTERED in favor of Defendant Koons, and against Plaintiff Nigh, in the amount of $1,959.73 plus interest under Counterclaim Count II for Nigh's breach of his agreement to pay the excess over his trade-in vehicle;

ORDERED that Koons is not entitled to any additional award for prevailing on its breach of contract claim in Count III because the $2,000 awarded on the promissory note satisfies the balance owed to Koons on the sales contract, which comprised the difference between the $6,000 down payment Nigh promised to pay by contract and the $4,000 down payment Nigh actually paid (as detailed above, Koons is *not* entitled to the installment payments on the contract, the value of which Koons assigned to Defendant HAFC). It is further

ORDERED that Koons' Counterclaim Counts IV and V are DISMISSED WITH PREJUDICE as being without merit.

Finally, upon calculation of the preceding, it is hereby

ORDERED that DAMAGES ARE AWARDED for Plaintiff Bradley Nigh, and against Defendant Koons Buick Pontiac GMC, Inc., in the total amount of $28,192.80 plus interest;

ORDERED that DAMAGES ARE AWARDED for Defendant Koons Buick Pontiac GMC, Inc., and against Plaintiff Bradley Nigh, in the total amount of 3,959.73 plus interest. Interest upon $2,000 of the principal shall be calculated at a rate of 18% from March 23, 2000, as prescribed by contract.

The Clerk is directed to forward a copy of this Supplemented and Final Judgment to counsel of record.

Entered this 15th day of August, 2001.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
08/15/01

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Bradley Nigh,	)
	)
Plaintiff,	)
	) Civil Action
	) No. 00-1634-A
Koons, Buick, Pontiac, GMC, Inc. et al,	)
	)
	)
Defendants.	)
	)

MEMORANDUM ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Attorneys' Fees and Costs.

The issue before the Court is whether Plaintiff has demonstrated that he is entitled to the requested attorneys' fees and court costs under the Virginia Consumer Protection Act or the Truth in Lending Act. The Court holds that Plaintiff is entitled to attorneys' fees and court costs under both statutes. Plaintiff won claims under both the Virginia Consumer Protection Act and under the Truth in Lending Act. The Virginia Consumer Protection Act states, "in addition to any damages awarded, such persons also may be awarded reasonable attorney's fees and court costs." VA. CODE ANN. § 59.1-204 (Michie 2000). The Truth in Lending Act states, "in the case of any successful action to enforce the foregoing liability . . . [the plaintiff should be awarded] the cost of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(3). Thus, applying Federal Rule of Civil Procedure 54(d), the four factors used in *Superior Form Builders v. Dan Chase Taxidermy Supply Co.*, 881 F. Supp. 1021, 1024 (E.D. Va. 1994), and the twelve

"Johnson factors", adopted by this jurisdiction in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (citing *Johnson v. Georgia Highway Express, Inc.*, F.2d 714, 717-19 (5th Cir. 1974) and applied in *Superior Form Builders*, the court awards Plaintiff attorneys' fees and costs. However, the Court reduces the amount of the requested award by forty percent to reflect the overall lack of success by the plaintiff in this lawsuit. Hereby, Plaintiff is awarded $26,129.10 in attorneys' fees and costs.

I. BACKGROUND

On October 3, 2000, Plaintiff Bradley Nigh ("Nigh") initiated the present action against Defendant Koons, Buick, Pontiac, GMC, Inc. ("Koons"), alleging conversion, breach of contract, fraud and violations of the Federal Odometer Act, the Truth in Lending Act, and the Virginia Consumer Protection Act. On May 3, 2001, the jury returned its verdict in the form of special interrogatories. The jury found that Koons violated the Truth in Lending Act with regard to the disclosure of the amount financed and that Koons willfully violated the Virginia Consumer Protection Act with regards to representations made to induce Nigh to sign the third retail installment sales contract. Nigh has made a motion to this Court for the award of attorneys' fees and court costs in the amount of $43,548.50 for attorneys' fees and costs expended on behalf of Nigh.

II. PARTIES' ARGUMENTS

Plaintiff Nigh argues that the Court should grant an award of attorneys' fees to Nigh because of the statutory provisions found in both the Truth in Lending Act and the Virginia Consumer Protection Act. Further, Nigh argues, based on exhibits provided, that the attorneys' fees sought are both reasonable and accurate.

In opposition, Defendant Koons argues that Nigh's motion should be stricken because Nigh made a blanket claim of privilege during discovery and did not provide discovery as to

his attorneys' fees. Koons asserts that, should the motion not be stricken, the Court should withhold setting a schedule to resolve the motion pending resolution on appeal of whether Koons is liable to Nigh under either the Truth in Lending Act or the Virginia Consumer Protection Act. Further, Koons contends that Nigh should not be awarded attorneys' fees because his request is unreasonable.

III. DISCUSSION

A. Koons' Supplemental Motion.

As an initial matter the Court grants Koons leave to file its Supplemental Opposition. However, the Court does not accept any of the arguments therein.

B. Compliance with Federal Rule of Civil Procedure 54(d)(2).

Nigh, in filing this motion, has fulfilled the requirements of Rule 54(d)(2). Rule 54(d)(2) governs the award of attorneys' fees and costs. Rule 54(d)(2) states that the plaintiff must make a motion for award of attorneys' fees and costs within 14 days of the entry of a final order, specify the statute entitling the plaintiff to attorneys' fees, and state the amount of legal fees sought. FED. R. CIV. P. 54(d)(2). Although Nigh filed this motion prior to the entry of the final order that would give him statutory authority to be awarded attorneys' fees, Nigh has complied with the 14-day statute of limitations in filing this motion. Nigh's claim is based upon the Virginia Consumer Protection Act and the Truth in Lending Act. Both statutes allow a plaintiff to be awarded attorneys' fees, and Nigh prevailed on claims under both acts.

C. Application of the Superior Form Builders Factors for Virginia Consumer Protection Act Award.

Although the award of attorneys' fees under the Virginia Consumer Protection Act is discretionary, because Nigh prevailed under the Virginia Consumer Protection Act, he

should be awarded attorneys' fees under this statute. *See* VA. CODE ANN. § 59.1-204.

In determining whether to award attorneys' fees under a discretionary statute, the Court should consider four factors in deciding whether to award attorneys' fees: (1) the motivation of the parties; (2) the objective reasonableness of the legal and factual positions advanced; (3) the need in particular circumstances to advance considerations of compensation and deterrence; and (4) any other relevant factors presented. *See Superior Form Builders*, 881 F. Supp. at 1024. Although the Fourth Circuit has adopted this four-prong test in order to decide whether to award attorneys' fees under section 505 of the Copyright Act[1], this Court used the test as a guide in determining whether Nigh should be awarded attorneys' fees under the Virginia Consumer Protection Act because the award of attorneys' fees under both Acts is discretionary.

First, the Court considers the motivation of the party from whom attorneys' fees are sought. *See Superior Form Builders*, 881 F. Supp. at 1024. In considering the motivation of the parties, the district court may consider whether the opposing party acted willfully or in bad faith. In *Superior Form Builders*, the jury found that the defendant had acted willfully in infringing the plaintiff's copyrights. This finding weighed heavily in favor of awarding attorneys' fees to the plaintiff. In this case, the jury found that Koons willfully violated the Virginia Consumer Protection Act with regards to representations made to induce Nigh to sign the third retail installment sales contract. Although not dispositive, the fact that Koons willfully violated the Virginia Consumer Protection Act, weighs heavily in favor of awarding attorneys' fees to Nigh.

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[1] Section 505 of the Copyright Act provides that "[i]n any civil action under this title, the court in its discretion may . . . award a reasonable attorney's fee to the prevailing party as part of the cost." 17 U.S.C. § 505.

The next factor the Court considers in deciding whether to award attorneys' fees is the objective reasonableness of the legal and factual positions advanced by the party opposing the award of attorneys' fees. This enables the Court to determine whether the positions advanced by the opposing party in the primary suit were frivolous or well grounded in law and fact. In *Superior Form Builders*, the court determined that although the defendant's positions were not frivolous, they were not well grounded in law. *See Superior Form Builders*, 881 F. Supp. at 1024. In this case, the Court holds that Koons' positions were not frivolous and were well grounded in law and fact because Koons prevailed on many of the original counts and claims. However, the jury did find that Koons willfully violated the Virginia Consumer Protection Act, and thus, this factor weights in favor of a fee award for Nigh.

Next, the Court evaluates the need to advance considerations of compensation and deterrence. In *Superior Form Builders*, the defendant had pending suits against him and his company in other jurisdictions for identical copyright infringement claims. Hence, the court determined that only a substantial award of damages as well as attorneys' fee would deter the defendant from continuing his wilful and outrageous conduct. In this case, the record does not reflect repeated willful violations of the Virginia Consumer Protection Act by Koons. Thus, the Court does not view deterrence as a justification for awarding attorneys' fees to Nigh.

Finally, in deciding whether to award attorneys' fees, the Court considers any other relevant factors to determine if an award of attorneys' fees should be given. In *Superior Form Builders*, the court determined that the defendant made the trial more difficult, and thus more costly, by making continued attempts during trial to confuse the jury with irrelevant and settled issues. In this case, Koons assisted the litigation by pursuing a motion for summary judgment in order to ferret out weak and meritless claims. The Court ultimately granted summary judgement on two/thirds of Koons' contentions.

However, the Court must still consider that a jury did find Koons liable for violating the Truth in Lending Act with regards to the disclosure of the amount financed. Thus, the jury verdict here holds Koons liable for attorneys' fees and costs under the Truth in Lending Act and the Virginia Consumer Protection Act.

D. Application of the 12 Johnson Factors.

When making a determination on a motion for an award of attorneys' fees, district courts must consider several factors in order to determine whether the amount of the attorneys' fees requested is reasonable. In order to make such a determination the Court considers the following twelve factors, also known as the "Johnson factors:" (1) the time and labor expended; (2) the novelty and difficulty of the question raised; (3) the skill required to properly perform the legal service rendered; (4) the attorneys' opportunity cost in presenting the instant litigation; (5) the customary fee for like work; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *See Barber*, 577 F.2d at 226; *Superior Form Builders*, 881 F. Supp at 1025. The Court must consider each of the 12 factors and its impact on the reasonable hourly rates or on the reasonable number of hours expended before granting an award of attorneys' fees. In addition to the 12 factors, the moving party must prove entitlement to an award, document hours expended, and document hourly rates. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (U.S. 1983).

1. Time and labor expended.

The Court holds that documents support a finding that the time and labor expended by Nigh's attorneys on this case were reasonable and necessary in order to accomplish the required tasks, and that no unnecessary work was performed in order to increase the legal fees. In *Superior Form Builders*, the moving party submitted affidavits from his own attorneys and from local attorneys verifying hours spent and customary charges. *See Superior Form Builders*, 881 F. Supp. at 1026. In addition, the court considered how the attorneys' experience in complex and specialized litigation reduced the total time and labor required for the case. Although Nigh did not provide information about attorneys' fees during discovery, Nigh has submitted affidavits supporting the amounts charged and a detailed record of tasks performed and hours spent. Although Koons argues that Nigh's attorneys spent excessive time on each task, Nigh contends that his attorneys actually waited just before trial to do most of the preparation work in order to keep legal fees down as low as possible. Therefore, the Court holds that Nigh's attorneys spent reasonable time and labor on this case, and that Nigh's attorneys produced sufficient evidence in support of such an award. Thus, the Court holds that this factor is favorable to awarding Nigh the requested amount for attorneys' fees.

2. The novelty and difficulty of the question raised.

The Court holds that the novelty and difficulty of the questions raised in this case were at least moderate. In *Superior Form Builders*, the court took into account that the issue before the court was one of first impression, involving new and complex questions of copyright law which required technical evidence. Although Koons suggests that the case could have been settled out of court or at summary judgment, Koons offers no specific argument regarding the novelty and difficulty of the questions raised. Nigh argues that the issues before the court were moderately novel and difficult. Nigh

submits that the law is in development and there are very few published jury instructions, and that the law is rapidly changing within the Virginia United States district courts. However, the Court holds that many of Nigh's claims were overblown and boilerplate blanket claims that ultimately had no merit. For example, Nigh claimed a violation of the Federal Odometer Act when it is clear that the odometer was working and was accurately described to Nigh when he took possession of the vehicle. Therefore, the Court, upon consideration of the legal issues presented during the motions, holds that this case presents moderately challenging litigation. Thus, the Court holds that this factor is marginally favorable to awarding Nigh the requested amount for attorneys' fees.

3. The skill required to properly perform the legal services rendered.

The Court holds that this area of law requires at least moderate skill in order to properly perform the legal services rendered. In *Superior Form Builders*, the court considered how the "case required lawyers with skills in both the substantive area of copyright law and in complex litigation." *Superior Form Builders*, 881 F. Supp. at 1026. In this case, Nigh contends that few lawyers practice or understand this area of law because the complexity in these cases emanates from the inter-relationship between various statutes and Virginia law governing automobile dealers. Koons does not contest this argument. Therefore, the Court holds that Nigh's attorneys required at least moderate skill in order to properly perform the legal services rendered. Thus, the Court holds this factor as favorable to awarding Nigh the requested amount for attorneys' fees.

4. The attorneys' opportunity cost in pressing the instant litigation.

The Court holds that Nigh's attorneys had to forego other employment in order to litigate this case. In *Superior Form Builders*, the court considered the number of cases placed on

the "back burner," the attorneys' potential lost earnings, and the time and duration spent on trying the case. In this case, Nigh's attorneys contend that they were unable to accept other matters and perform work for other clients while working on this case, particularly, during the month of April 2001. Further, Nigh argues that, as a general rule, attorneys receive a greater hourly rate for work performed on cases that settle than for ones that go to trial. Accordingly, trying a case like this one not only prevents acceptance of other matters, but leads to a lower hourly rate on lawyer time. Koons does not contest this argument. Therefore, the Court holds that Nigh's attorneys had to forego other employment to litigate this case. Thus, the court holds that this factor is favorable to awarding Nigh the requested amount for attorneys' fees.

5. The customary fee for like work.

The Court holds that Nigh's attorneys' hourly rates for all its employees are reasonable. In *Superior Form Builders*, the court looked at affidavits and the 1993 Report of Economic Survey to determine the reasonableness of the attorneys' fees. *See* 881 F. Supp. at 1026. In addition, the court used its own experience to determine that the rates were reasonable. In this case, Nigh's attorneys have submitted an affidavit supporting the reasonableness of the rates charged. Koons offers no evidence to rebut the reasonableness of these rates. Therefore, the Court holds that the hourly rates charged by Nigh's attorneys were reasonable. Thus, the Court holds this factor as favorable to awarding Nigh the requested amount for attorneys' fees.

6. Whether the fee is fixed or contingent.

This factor is later discussed in combination with factor 10, the "undesirability" of the case. *See infra* § III(d)(10).

7. The time limitations imposed by the client or circumstance.

The Court holds that no time limitations were imposed by the client or by the circumstances. Nigh does not contend, nor

does Koons contest, that there were any significant time limitations imposed by the client or the circumstances. Nigh's attorneys state that they had plenty of time to draft and file the Complaint under the applicable statutes of limitations. Therefore, the Court holds that no significant time limitations were imposed upon Nigh's attorneys. Thus, this factor neither favors nor disfavors the requested award of fees because the fees charged were neither increased nor decreased by time factors.

8. The attorneys' expectations at the outset of the litigation and the result obtained.

The Court holds that Nigh's counsel's expectations at the outset of the litigation were not reasonable. In this case, Koons contends that Nigh's fees are not related to the result obtained and that Nigh's attorneys needlessly increased the cost of litigation. Nigh filed a thirteen count Complaint with over forty claims alleging violations of the Federal Odometer Act, the Truth in Lending Act, the Virginia Consumer Protection Act, as well as breach of contract, fraud, and conversion. *Most of Nigh's claims were dismissed on Defendants' motions for summary judgment.* Out of all the counts and claims made in the Complaint, Nigh only prevailed on two claims. Therefore, the Court holds that Nigh obtained limited success in the lawsuit. In *Hensley v. Eckerhart*, the United States Supreme Court stated that the most critical of the twelve factors in evaluating the reasonableness of the amount requested for attorneys' fees is the degree of success. *See* 461 U.S. 424, 436 (1983). Thus, the Court holds that this factor is very unfavorable to awarding Nigh the requested amount for attorneys' fees.

9. The experience, reputation, and ability of the attorney.

The Court holds that Nigh's attorneys are competent to bring this type of lawsuit. In *Superior Form Builders*, the court looked at affidavits which supported the good reputation, ability, and the complex litigation experience of the attorneys

involved. *See* 881 F. Supp. at 1028. Although Nigh's attorneys do not have affidavits from the community regarding their reputation, Mr. Blankingship's affidavit does give evidence of his and the other attorneys' experience and ability. Koons does not refute the experience, reputation, or ability of Nigh's attorneys. Therefore, the Court holds that Nigh's attorneys are competent to litigate cases of this type. Thus, the Court holds this factor as favorable to awarding Nigh some amount of attorneys' fees.

10. The undesirability of the case within the legal community in which the suit arose.

The parties agree that consumer automobile litigation is neither the most desirable nor the most profitable area of law to practice. In *Superior Form Builders*, the court discussed *Johnson* Factors 6[2] and 10[3] together. *See* 881 F. Supp. at 1027. The court held that contingency arrangements favor awarding plaintiff's attorneys the requested value of their services because, under such arrangements, the attorney accepts the case with the possibility that they would not receive compensation. Nigh contends that cases like this have been and remain very undesirable in the legal community because most lawyers cannot find a way to make money and keep from going bankrupt while practicing this kind of law. Further, Nigh argues that most clients who need legal help with problems with car dealers often have poor credit, little money, and are unable to afford to pay a lawyer's hourly rate. Yet, in this case, Nigh's counsel did not proceed on a contingency basis. Nigh argues that the legislative intent of the fee-shifting provisions in the TILA and the VCPA are to make these cases more desirable for attorneys to bring, thereby, helping the government enforce the statutes. Koons

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[2] Johnson Factor 6 considers whether the fee is fixed or contingent.

[3] Johnson Factor 10 considers the overall "undesirability" of the case.

does not contest the undesirability of these types of cases. Therefore, the Court holds that these types of cases are indeed undesirable. Thus, the Court holds that this factor is favorable to awarding Nigh some amount for attorneys' fees.

11. The nature and length of the professional relationship between attorney and client.

The Court holds that no special relationship existed between Nigh and his attorneys. In *Superior Form Builders*, the court considered whether the plaintiff received a special rate from any of the attorneys involved in the case. *See* 881 F. Supp. at 1028. In this case, Nigh never describes in detail the relationship between him and his attorneys. However, Nigh does state that this sort of case rarely involves repeat clients; thus, the relationship with the client is short-lived. Koons does not offer any counter arguments in regards to this element. Therefore, the Court holds that no special relationship existed between Nigh and his attorneys. Thus this factor neither favors nor disfavors the award of the requested amount for attorneys' fees because the fees charged were neither increased nor decreased because of any special relationship between Nigh and his attorneys.

12. Awards in similar cases.

The Court holds that to award Nigh the entire amount request for attorneys' fees would be unfair. In *Superior Form Builders*, the court rendered a fair and just award of attorneys' fees. *See* 881 F. Supp. at 1028. Nigh argues that attorneys' fees awarded for similar cases are not well established in this courthouse. However, Nigh did note that this Court recently awarded counsel all of his legal fees at the requested hourly rate in *Harless v. EEE Auto Sales*. *See* Order Granting Pl.'s Mot. Att'ys' Fees ¶¶ 2-3 (Apr. 24, 2001). Although the Court in *Harless* awarded counsel the entire amount of attorneys' fees requested, for reasons previously stated, the Court will not award Nigh the entire amount of attorneys' fees requested because Nigh's success on the merits was marginal. The

Court will make a limited attorneys fee award. As stated by the United States Supreme Court in *Hensley*, the most important factor in determining attorney's fees is the degree of success. *See* 461 U.S. at 436. Here, Nigh asserted over forty claims, some of which the record reflects were boilerplate and without factual basis; The Court dismissed more than thirty claims. In short, the case was over litigated by Nigh's counsel and several claims were without merit. Therefore, only a limited award of attorneys' fees is warranted.

IV. CONCLUSION

In conclusion, the Court awards Nigh attorneys' fees and costs. However, the Court does not award Nigh the entire requested sum of $43,548.50 in attorney's fees and costs. The Virginia Consumer Protection Act and the Truth in Lending Act both give the Court the statutory authority to award attorneys' fees. Nigh was won claims under both acts. However, after applying the *Johnson* factors found in *Superior Form Builders*, the Court holds that the requested amount for attorneys fees is not reasonable because of Nigh's limited success in the lawsuit. Although Factors 7 and 10 neither favor nor disfavor the award of attorneys' fees, and most of the other factors weigh in favor of awarding Nigh the requested attorneys' fees, Factor 8 does not. Although the facts and the law are too related to reduce the amount of the attorneys' fees award on a claim by claim basis, it is necessary to reduce the amount of the reward to reflect Nigh's limited success in this lawsuit. Therefore, the Court reduces Nigh's requested amount of $43,548.50 by forty percent, and thus awards him $29,129.10 in attorneys' fees and costs. Accordingly it is hereby

ORDERED that Plaintiff's Motion for Attorneys' Fee is GRANTED; and

ORDERED that Defendant Koons is ordered to pay Plaintiff Nigh $26,129.10 for attorneys' fees and court costs.

The clerk is directed to forward a copy of this Order to counsel of record.

Entered this 10th day of August, 2001.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
08/10/01

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 9, 2003

No. 01-2201
CA-00-1634-A

BRADLEY NIGH

Plaintiff - Appellee

v.

KOONS BUICK PONTIAC GMC, INCORPORATED

Defendant - Appellant

and

HOUSEHOLD AUTOMOTIVE FINANCE CORPORATION

Defendant

No. 01-2224
CA-00-1634-A
CA-00-1634-A

BRADLEY NIGH

Plaintiff - Appellant

v.

KOONS BUICK PONTIAC GMC, INCORPORATED; HOUSEHOLD AUTOMOTIVE FINANCE CORPORATION

Defendants - Appellees

On Petition for Rehearing and Rehearing In Banc

Appellant/cross-appellee Koons Buick Pontiac GMC, Inc. filed a petition for rehearing and rehearing en banc. Appellee/cross-appellant Bradley Nigh filed a response in opposition to the petition for rehearing and rehearing en banc. Defendant/cross-appellee Household Automotive Finance Corporation also filed an answer to the petition for rehearing en banc.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Luttig for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

(4)

NO. 03-377

IN THE
Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The civil liability provision of the Truth in Lending Act provides, in relevant part, that any creditor who violates the Act "with respect to any person is liable to such person in an amount equal to the sum of—"

> . . . (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[.]

15 U.S.C. § 1640(a)(2)(A). The parties agree that "this subparagraph" does not include (A)(iii). The question presented is

Whether the phrase "liability under this subparagraph," and thus the limitation on damages awards set forth in (A)(ii), applies just to (A)(ii) or to both (A)(i) and (ii).

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STATEMENT OF THE CASE

FACTUAL BACKGROUND

In February 2000, respondent Bradley Nigh contracted to purchase a 1997 Chevrolet Blazer from petitioner Koons Buick. As part of the transaction, Mr. Nigh traded in his truck and made a $4,000 down payment. He got no price discount for his trade-in because he estimated the remaining loan balance to equal the price that Koons Buick gave him for the truck. Mr. Nigh signed a Buyer's Order, reflecting the proposed purchase, and a retail installment sales contract, reflecting the proposed financing. Mr. Nigh left his truck and drove home in the Blazer. App. 2a.

Koons Buick was unable to find a lender to purchase the assignment of the installment payments. It therefore decided to restructure the deal to require an additional $2,000 down payment. Koons Buick represented to Mr. Nigh that this change was a "better deal" at a lower rate and that he had to sign a new contract. Mr. Nigh returned to the dealership and told Koons Buick that he did not have an additional $2,000. He asked Koons Buick to allow him to return the Blazer, take back his truck, and walk away from the deal. Koons Buick told him—falsely—that he could not withdraw from the deal because it had already sold his truck. Mr. Nigh, "unaware of this statement's falsity, and at a loss," signed a new contract and a $2,000 Promissory Note. *Id.* 3a.

Again, Koons Buick could not find a lender; and, again, it called Mr. Nigh to sign another contract. Mr. Nigh alleged that Koons Buick left a message that if he did not come to sign the new contract, it would report the Blazer as stolen. Afraid of being arrested, Mr. Nigh returned to Koons Buick and signed the contract under protest.

Mr. Nigh stopped making payments on the note for his trade-in vehicle when he believed that it had become the property of Koons Buick. He later learned that his truck had not been sold as Koons Buick represented to him, but rather had been repossessed by its note-holder from the lot of Koons Buick because of non-payment on the note. He also learned that one reason Koons Buick could not find a lender to assume the second contract was that it wrongfully included a $965 charge for an accessory that Mr. Nigh had neither requested, agreed to accept, nor received. *Id.* 3a-4a.

Even after the transaction closed, Koons Buick did not transfer title of the Blazer to Mr. Nigh. Approximately six weeks after signing the third contract, Mr. Nigh returned the Blazer to Koons Buick with a letter stating that he was enforcing his right to rescind the transaction and recover his down payment and trade-in. (JA 772.) Koons Buick refused to accept the rescission and yet continued to withhold the title.

PROCEEDINGS BELOW

Nigh brought suit against Koons Buick, alleging claims under the Truth In Lending Act (TILA), the Federal Odometer Act (FOA), the Virginia Consumer Protection Act (VCPA), and common law fraud. Koons Buick filed a counterclaim for breach of contract and for fraudulent and negligent misrepresentation. The district court granted summary judgment on some claims, and other claims were tried to a jury. The jury found that Koons Buick violated TILA "by intentionally including a charge" on the sales contract "with knowledge that there was no basis for the charge," App. 9a, and that Koons Buick violated the VCPA by falsely telling Mr. Nigh that it no longer had possession of his trade-in, so as to induce him to sign a new sales contract. *Id.* 4a. The jury

awarded Mr. Nigh $24,192.80 (twice the amount of the finance charge in connection with the transaction) for the TILA violation and $4,000 for the VCPA violation. *Id.* 2a.[1]

Each party appealed various aspects of the district court judgment to the Fourth Circuit. For present purposes, the only relevant issue is Koons Buick's argument that TILA, 15 U.S.C. § 1640(a)(2)(A), capped the damages award at $1,000. Koons Buick based its argument on *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983). There, the court of appeals was applying a prior version of TILA, which provided that damages would be equal to

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000[.]

15 U.S.C. § 1640(a)(2)(A) (1983) (emphasis added). In *Mars*, the court of appeals had assumed, without analysis, that the bold-faced language applied to both (i) and (ii), and therefore that damages awarded under either (i) or (ii) were limited to $1,000. 713 F.2d at 67.

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[1]The jury also found that Koons Buick had violated the FOA but did not find the requisite intent to defraud.

Looking to the current version of section 1640((a)2)(A), the Fourth Circuit rejected Koons Buick's reliance on *Mars*. Since its amendment in September 1995, section 1640(a)(2)(A) provides that creditors that violate TILA may be liable for

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 [.]

15 U.S.C. § 1640(a)(2)(A) (emphasis added). In an opinion by Judge Luttig, the court held that, although its prior assumption about the scope of "this subparagraph" was "plausible" in 1983, the 1995 amendment "rendered [that] interpretation "defunct." App. 11a. The court held that, under the plain language of section 1640(a)(2)(A), "this subparagraph" referred only to (ii)—the subparagraph in which the words appear. Accordingly, the court of appeals upheld the jury's award of twice the amount of the finance charge. *Id.* 11a-13a.

Judge Gregory dissented on the basis that the legislative history of the 1995 amendment did not manifest a specific intent to overrule the reading given to the prior version of section 1640(a)(2)(A) in *Mars*. *Id.* 17a.

REASONS FOR DENYING THE WRIT

A. There Is No Meaningful Split On The Question Presented.

Koons Buick's primary argument for review is that the decision below conflicts with the Seventh Circuit's decision in *Strange v. Monogram Credit Card Bank*, 129 F.3d 943 (7th Cir. 1997). The *Strange* decision does not support a writ of certiorari for several reasons.

In *Strange*, defendant Monogram failed to credit plaintiff Strange's credit card for an item that Strange had returned to a store and failed to respond Strange's letters asking that the error be corrected. In February, 1995, Strange brought suit under TILA and sought "statutory damages in the amount of twice the finance charge not to exceed $1000 in accordance with 15 U.S.C. § 1640(a)(2)." *Id.* at 945; *see* Docket Sheet, www.ca7.uscourts.gov/dkt.fwx. The trial court found that the company had violated TILA by failing to send Strange a written explanation of the billing error and awarded Strange $1,000. Monogram moved for reconsideration, asking that the award be reduced to $100. In response to that motion, the court reduced the award to $54.72, twice the amount of the erroneously billed finance charge. *Id.* On appeal, Strange argued that he was entitled to the statutory minimum of $100. Monogram agreed. *Id.* at 946-47.

Although the court recognized that both sides agreed on the proper reading of 15 U.S.C. § 1640(a)(2)(A), it chose to address the issue anyway because "this is a pure question of law on a matter of considerable commercial interest." *Id.* at 947. Because the Seventh Circuit reached its decision with no adversarial briefing or argument on the question presented here,

Strange is thus a particularly weak case on which to base a conflict argument.

Moreover, the opinion in *Strange* does not disagree with the Fourth Circuit below that the plain meaning of section 1640(a)(2)(A) sets no statutory minimum or maximum on damages awarded under subpart (i). *See id.* at 947 (reading limits to apply only to subpart (ii) "has a certain appeal," but rejecting reading based on history of statute). The Seventh Circuit opinion notes, however, that before the 1995 TILA amendments, other courts interpreted the limits on damages awards to apply to both (i) and (ii). The court then states, without citation, that Congress did not intend the 1995 amendments to effect any change to subpart (i). 129 F.3d at 947. Significantly, the only appellate decision cited for the proposition that the limits set forth in subpart (ii) applied to subpart (i) under the prior version of the statute is the Fourth Circuit's decision in *Mars*, 713 F.2d at 67, which, as noted above, assumed without analysis that awards under (i) were subject to the limits of (ii). Yet the Fourth Circuit itself (in its decision in this case) has, since *Strange*, expressly found that its analysis in *Mars* is inapplicable to the current version of section 1640(a)(2)(A). By rejecting the very use of its own precedent that the Seventh Circuit employed, the decision below has weakened the reasoning of *Strange*.

Strange is a weak precedent, and thus a poor basis for establishing a conflict, for another reason. Plaintiff Strange filed his case in February 1995—seven months before section 1604(a)(2)(A) was enacted. Because the amendment was not retroactive, *see I.N.S. v. St. Cyr*, 533 U.S. 289, 315-16 (2001), the court of appeals erred in assuming that the amended statute applied. For this reason, as well as the lack of adversarial briefing, one wonders whether the Seventh Circuit would even

feel bound by *Strange*, were the issue presented to it in a proper case. In any event, in light of the peculiar procedural posture in *Strange* and the intervening decision below—the only appellate decision to have addressed the question in a genuinely meaningful and adversarial context—the Seventh Circuit would likely want to revisit the decision in *Strange* en banc, even if a Seventh Circuit panel would not.

Because no other court of appeals has addressed the question presented here in a case in which the issue was properly presented, the petition should be denied.[2]

B. Petitioner's Complaints About TILA Offer No Basis For Review.

Koons Buick also argues that review is warranted because the decision below will increase consumers' recoveries under TILA, and will thus cost defendants more money. First, that complaint is properly presented to Congress, not to this Court.

Second, Koons Buick's argument is not necessarily correct. To begin with, in many cases, the Fourth Circuit's reading of TILA's plain language will result in a *lower* award than Koons Buick's reading. For example, on the facts presented in *Strange*, the Fourth Circuit would award $54.72, rather than $100, because twice the finance charge was less

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[2]Outside the Fourth and Seventh Circuits, the only case interpreting section 1604(a)(2)(A), since it was amended in 1995, appears to be *In re Derienzo*, 282 B.R. 586 (M.D. Pa. 2002). That decision is in accord with the decision below and expressly rejects *Strange*.

than the minimum set forth in section 1604(a)(2)(A)(ii). Moreover, although Koons Buick cites statistics to show that TILA is often violated by lenders or creditors such as itself, it does not cite any current cases to show that these violations result in undue or unjustified litigation. In fact, the most recent case cited for the proposition that companies are subject to undue TILA litigation is from 1984. Pet. 18.

Finally, Koons Buick's perverse attempt to garner sympathy for itself and companies like it on the basis that "TILA is the most commonly violated consumer protection law," Pet. 16, counsels *against* granting the petition. If TILA is often violated, the cure is to provide consumers with more, not fewer, incentives to enforce their rights and to impose higher, not lower, penalties that would deter violations.[3]

C. The Decision Below Is Supported By The Unambiguous Language Of The Statute.

As Judge Luttig found, the plain language of section 1640(a)(2)(A) supports only one reading: that the limits stated

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[3]Even further afield, Koons Buick claims that the meaning compelled by the plain language of the statute may lead to excessive awards, vulnerable to constitutional challenge. Pet. 24 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003)). Apart from the question whether this Court is inclined to extend *State Farm* to damages other than punitives, Koons Buick has cited no TILA case, including this one, in which the award poses a constitutional problem. *See also Mathias v. Accor Economy Lodging*, 347 F.3d 672 (7th Cir. 2003) (where actual damages relatively small, larger ratio of compensatory to punitive damages may be justified).

in subpart (ii) apply only to awards under subpart (ii). Again, the provision states:

> **(2)(A)(i)** in the case of an individual action twice the amount of any finance charge in connection with the transaction, **(ii)** in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, **except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000**, or **(iii)** in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[] (emphasis added).

The question presented is simply to what subsections "under this subparagraph" refers: to (i) and (ii), or only to (ii). Because (iii) states its own maximum and minimum, everyone agrees that "under this subparagraph" does not include (iii). Pet. 22 n.14 (stating that "obviously" the phrase does not include (iii)). Given that agreement, the "subparagraph" referred to in section 1604(a)(2)(A)(ii) cannot be (A). And (i) and (ii), taken together, do not constitute a discrete subparagraph. Accordingly, when (ii) says "this subparagraph," it must be referring to itself, that is, to (ii).

Koons Buick does not address this analysis. Instead, it argues that the phrase "under this subparagraph" is superfluous under the Fourth Circuit's reading, and thus that "this subparagraph" must refer to two out of the three parts of (A). However, as Judge Luttig pointed out, the limitations in (ii) are

separated from the first two types of award calculations only by a comma. Arguably then, without the phrase "under this subparagraph," the limitations might be read to apply to both (i) and (ii). Using the phrase, Congress made clear that the limits apply only to "this" subparagraph. Again, the only discrete subparagraph to which "this" could possibly refer is (ii).

The word "subparagraph" also appears in section 1640(a)(2)(B). Because in subpart (B) the word "subparagraph" indisputably refers to all of (B), Koons Buick argues that in section 1640(a)(2)(A)(ii) the word must refer to all of (A). This theory misses the mark. First, as mentioned above, Koons Buick concedes that the first use of "subparagraph" does not refer to all of (A). Pet. 22 n.14. Its contention is that "this subparagraph" refers to two-thirds of (A)—a reading inconsistent with its own argument about (B). Second, unlike (A), (B) has no subparts. Thus, each use of the word "subparagraph" refers to the "sub" in which the word appears: to (A)(ii) and to (B). Perhaps Congress could have used the awkward term "sub-subparagraph" to refer to (A)(ii), but surely no rule of statutory interpretation requires it to have done so.

Koons Buick is correct that Congress did not state either way whether it intended the 1995 amendment to affect the scope of the term "this subparagraph." Congress's silence on this point, however, is of no help to Koons Buick. *See Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) ("Of course, where the language is unambiguous, silence in the legislative history cannot be controlling."). Perhaps, as Koons Buick would have it, Congress intended to maintain the reading previously assumed by the Fourth Circuit in *Mars*. Yet it is equally plausible that Congress intended either to correct the erroneous assumption (reflected in *Mars*) that the limits stated

at the end of (ii) applied to damages under (i), or that Congress intended to repeal what until then had been a cap on awards under (i). The legislative history simply does not say. Congress expressed its intent only through the text of section 1640(a)(2)(A). That text is susceptible to only one interpretation, as the Fourth Circuit held.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-377

IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR THE PETITIONER

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REPLY FOR THE PETITIONER

The opinion of the court below is a caricature of strict construction. It reaches the highly implausible conclusion that the Truth in Lending Act's (TILA) statutory damages remedy, 15 U.S.C. § 1640(a)(2)(A)—which provides a private cause of action for borrowers against consumer lenders without any showing of actual harm or culpable intent—was amended in 1995 to eliminate the $1,000 cap on recoveries that previous court's have uniformly found applicable. It does so based on the erroneous premise that the words of the statute "compel[]" this interpretation "regardless of [Congress's] intent." Pet. App. 13a.

Respondent's opposition echoes the reasoning of the Fourth Circuit, maintaining that the words of the statute as amended in 1995 are clear and unambiguous and that is the end of the inquiry. But as the Petition for Certiorari demonstrates, the Fourth Circuit's reading gives a far-from-tidy account of the statute's language and is flagrantly at odds with all indicia of legislative history and purpose.

As the petition further demonstrates, the Fourth Circuit's ruling is directly contrary to the decision of the Seventh Circuit in *Strange v. Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997), and thus creates a sharp disagreement among the federal courts on an issue of extraordinarily broad relevance, given TILA's coverage of many millions of transactions every year.

Because the decision below results in drastic increases in potential recoveries (equal to double the finance charge in each instance of a technical violation) that are entirely unrelated to actual harm suffered, it will lead to quite divergent results depending where a case arises. It will also likely cause a rash of speculative litigation. For these reasons, and because the legal issue presented is a quite straightforward one—which would not benefit from further percolation in the lower courts—this Court should grant certiorari and reverse the decision of the court below.

Respondent opposes this Court's review, arguing that the Seventh Circuit's decision in *Strange* does not create a "meaningful split," that the vastly increased potential exposure of creditors

"offer[s] no basis for review," and that the decision below is obviously correct. All of those contentions are without merit.

The *Strange* decision creates a clear and direct split on whether the $100-$1,000 limitation found in Section 1640(a)(2)(A) applies to statutory damages under subsection (i). Moreover, the Seventh Circuit in *Strange* fully considered the issue as part of its holding and reached a conclusion diametrically opposite to the court below. Contrary to Respondent's contention (Opp. 6) that the "opinion in *Strange* does not disagree with the Fourth Circuit below that the plain meaning" sets no statutory minimum or maximum on recovery under subsection (i), the Seventh Circuit in fact concluded that the statutory language contains an "ambiguity." 129 F.3d at 947. In the face of this ambiguity, the Seventh Circuit appropriately looked to "the history" of the provision, and held that "the 1995 amendment," which introduced the ambiguity by adding subsection (iii), "was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards" for subsection (i). *Id.*

Contrary to Respondent's assertion, *Strange* is not "a weak precedent," simply because the 1995 amendment occurred after the events at issue in the case. Opp. 6. It is an established "principle that a court is to apply the law in effect at the time it renders its decision," and this principle only gives way for "new rules of law . . . that would have genuinely 'retroactive' effect." *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994). Having first found that the 1995 amendment to Section 1640(a)(2)(A) did not work a substantive change on the defendant's liability under subsection (i), the *Strange* court acted entirely appropriately in applying the current law—TILA as amended in 1995. Further, in all events, the parties in *Strange* did not dispute the application of the 1995 TILA amendments to their dispute, making the Seventh Circuit's interpretation of the provision binding precedent by any measure.

As a second argument for denying review, Respondent dismisses concerns about the likely consequences of the decision below. He notes that the fact that TILA is the most commonly violated consumer protection statute simply means that "the cure is to

provide consumers with more . . . incentives to enforce their rights," which is exactly the result of the Fourth Circuit's reading. Opp. 8.[1]

Apart from the crazy-quilt pattern of liability that results, and the utter absence of evidence that Congress ever considered let alone intended this result, this argument also ignores the fact that the complex and detailed nature of TILA's requirements means that technical violations will and do routinely occur despite the industry's best efforts. Indeed, as was aptly explained in the amicus brief filed by three of the nation's principal consumer-credit associations, this additional imposition of capricious and erratic liability will actually impair the availability of consumer credit without affording any concomitant increase in TILA compliance:

> Victories for TILA plaintiffs under the [Fourth Circuit's] new rule will be harmful to consumers nationwide because of increases in the cost of credit. Importantly, there is no reason to believe that the massively increased TILA liability that was brought about by the [Fourth Circuit's] decision will result in improved disclosures by creditors like members of amici. Those institutions already are largely successful at meeting their TILA obligations; and those violations that do occur are the result of the hyper-technical nature of the statutory and regulatory requirements and will not be cured by imposing greater punishment.

See Brief of ABA, AFSA and CBA as Amici Curiae 16 (internal citation omitted).

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[1] To be sure, Respondent also argues that there are no "current" decisions stating that TILA has "result[ed]" in undue or unjustified litigation." Of course, Respondent fails to acknowledge that the absence of decisions discussing "undue or unjustified [TILA] litigation" is due in large measure to the long-standing $1,000 cap on statutory damages under subsection (i), which thus far remains the law under decisions of other circuits based on the pre-1995 amended TILA. *See Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981).

Thus, as the Seventh Circuit in *Strange* put it, and as the briefs of the amici in this case make clear, this case squarely presents an issue of"considerable commercial interest." *Strange*, 129 F.3d at 947. *See also* Brief of ABA, AFSA and CBA as Amici Curiae 8 ("The potential for harm—to consumer lenders . . .; to manufacturers dependent on consumer purchasing; to consumers themselves; and to the national economy, which is driven by consumer spending—is difficult to overstate"); Brief of VADA, MNCTDA and WANADA as Amici Curiae 8 ("[The Fourth Circuit's] decision has an incalculable impact upon credit grantors, impacting the individuals to whom they may grant credit, the terms on which credit may be granted, the cost of putting procedures in place for granting credit, and other similar critical issues.").

Respondent's third and final basis for opposing review—that the Fourth Circuit's decision is supported by the "unambiguous language of the statute"—is wrong and does not counsel against review. Even looking solely at the words of the statute and ignoring its history, as Respondent urges the Court to do, Section 1640(a)(2)(A) is untidy and unclear,[2] and not "plain" and "unambiguous." In particular, the Fourth Circuit's reading

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[2] Section 1640(a) of TILA provides, in pertinent part, that:

(a) [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000.

15 U.S.C. § 1640(a) (2000).

necessitates the conclusion that the word "subparagraph" as it appears at the end of subsection (ii) changed its meaning as a result of the 1995 amendment that expressly altered no substantive words in the pre-existing sections. One must also conclude that the same word means something different in subsection 2(A) than it does in the immediately adjacent subsection 2(B), which likewise was untrue before 1995. Pet. 22. Further, the Fourth Circuit's unforgiving approach of rigidly ascribing to each of the three subsections only the words expressly associated with it would leave subsection (iii) devoid of any primary measure of liability, as Congress did not bother to expressly note that the "twice the amount of the finance charge" measure that appears in (i) was incorporated into (iii). *Id.* at 23.

When the ambiguity of Section 1640(a)(2)(A) is considered alongside the history and context of the 1995 amendments to the provision, the Fourth Circuit's error becomes obvious. Since 1968, the substantive provision that is now Section 1640(a)(2)(A)(i) has allowed a nominal recovery of up to $1,000 for technical violations of TILA without any showing of actual damages. In 1995, the statute was amended for the purpose of increasing the range of the statutory recovery for mortgage loans to $200 to $2,000, and this purpose was expressly confirmed by the legislative history. Neither the language of the enactment, which simply includes the new subsection (iii), nor the legislative history, suggests any intention to accomplish the far more radical objective ascribed to it by the Fourth Circuit.

Moreover, the statute that results from the Fourth Circuit's reading is strange, bordering on the bizarre. Without any showing of actual damages, plaintiffs proving violations related to leases and closed-end mortgages may secure no more than $1,000 and $2,000 respectively. But claimants under the statute's original provision applicable to the great bulk of technical TILA violations may recover much larger and widely varying amounts without regard to the fact or extent of any injury, and potentially exceeding the constitutionally-permissible bounds of exemplary damages under the Fifth Amendment's due process clause. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003).

There is simply no necessity or occasion here to read the statute in the strange and disruptive manner adopted by the court below. Given the straightforward nature of the issue presented—whether or not the $100-$1,000 limitation applies to subjection (i)—there is no reason to await decisions by other circuits.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND THE CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 37.2 of the Rules of this Court, the American Bankers Association, the American Financial Services Association, and the Consumer Bankers Association move for leave to file the accompanying brief in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondent has been asked for consent and has not consented.

The issue presented by the petition – whether Congress intended to eliminate the cap that had existed since 1968 on statutory penalties for non-mortgage, non-lease violations of the Truth in Lending Act (TILA) – is of profound importance to the consumer lending industry and to individual consumer borrowers nationwide. Members of *amici curiae* include thousands of lenders that, under the Fourth Circuit's new interpretation, potentially are subject to civil penalties *running tens of thousands of dollars in* ***each case*** for technical violations of TILA and its interpreting regulations, even when those violations are inadvertent and cause no harm to borrowers. *Amici curiae* are well situated to assist the Court in understanding the enormous importance of the TILA issue presented.

Amicus curiae American Bankers Association (ABA) is the largest national trade association of banks in the United States. The ABA represents approximately 90 percent of the domestic assets of United States banks, with members located in all fifty States and in the District of Columbia. ABA members include banks of all types and sizes – including money-center banks, regional banks, and community banks. The ABA frequently appears in litigation as *amicus curiae* in cases raising issues of widespread importance to banks or consumers of banking services.

Amicus curiae American Financial Services Association (AFSA) is the national trade association for finance companies and other consumer and commercial lenders that raise funds in the capital markets. Founded in 1916, AFSA has approximately 360 member companies operating more than 10,000 offices throughout the United States, all engaged in the extension of consumer credit. On behalf of its members, AFSA monitors legislative, regulatory, and judicial actions affecting the market-funded finance industry, and participates as *amicus curiae* in

litigation to ensure that the courts are apprised of relevant and accurate industry information.

Amicus curiae Consumer Bankers Association (CBA) was founded in 1919 and has as members most of the Nation's largest bank holding companies, as well as regional and super community banks, that collectively hold two-thirds of the banking industry's total assets (in excess of $2.9 trillion). Its member institutions are the leaders in consumer financial services, including auto finance, home-equity lending, credit cards, education loans, small business services, community development, investments, deposits, and delivery. Through its Government Relations Department, CBA advocates on behalf of its membership on issues before the regulatory agencies, the Legislative Branch, and the courts, including issues relating to TILA.

Amici have a strong interest in this Court's granting certiorari in view of the potentially catastrophic effect the Fourth Circuit's rule will have on the consumer credit industry. Members of *amici* are subject to TILA and its implementing regulations when engaged in their core business of consumer lending. The enormous possible harm to the industry from large-scale civil awards for technical violations of TILA in the absence of a cap on penalties was not adequately considered by the court below.

The Motion for Leave to File the accompanying Brief of the American Bankers Association, the American Financial Service Association, and the Consumer Bankers Association as *Amici Curiae* should be granted.

Respectfully submitted.

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

A. The Underlying Facts

This case arises out of an exceedingly common commercial transaction. After respondent Bradley Nigh went to a car lot owned and operated by petitioner Koons Buick Pontiac GMC, Inc., to purchase a used Chevrolet Blazer, he entered into a transaction substantially similar to transactions that take place 45 million times each year throughout the United States. Pet. 15. Like the vast majority of buyers of new and used automobiles, Nigh sought to finance his purchase. He entered into an arrangement under which, in exchange for his making a down payment, trading in his old car, and agreeing to proceed with a loan agreement on certain prescribed terms, he was able to take the Blazer home immediately – even though no lender had yet agreed to accept the arrangement reached by Nigh and Koons Buick. Pet. App. 2a. This type of "spot sale" is a common transaction in the consumer lending industry; it enables purchases and sales to proceed even at times when lending decisions cannot be made. Like all sellers of commercial goods engaged in spot sales, petitioner Koons Buick took a risk that it could secure financing for Nigh at the quoted rate.

Because of errors in the paperwork and the difficulty of finding a lender, petitioner and respondent signed two more agreements before Nigh ever entered into a contract with a

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

lender – during which time Koons Buick was deprived of the use of the Blazer, and was receiving no payment for it. By the time Nigh did become contractually obligated to pay on a loan, he apparently had decided he did not want the car – for he made no payments, but drove the Blazer for several weeks and then returned it. Pet. App. 3a-4a. On the basis of these events, Nigh sued petitioner in federal court under the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1666. Pet. App. 4a.

This is not an unusual fact pattern leading to a TILA suit: customers with buyer's remorse often become TILA plaintiffs after they or their counsel discover a glitch in the transaction, or a technical violation of one of TILA's many complex requirements, thereby providing grounds to back out of the bargain – and take home money as well in the form of an award under TILA. Indeed, if *respondent's* own counsel is to be believed, "[n]early every car transaction contains one or more violations of a statute or regulation." http://www.alexandriacitywebsite.com/Blankingship.htm (visited October 8, 2003).

B. The Truth In Lending Act

Distilled to its essence, TILA is a statute that requires lenders to disclose information related to consumer borrowing, with the intent of giving consumers a basis for evaluating the cost of credit. 12 C.F.R. § 226.1(b); RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 1.01, at 3 (Robert A. Cook et al., eds. 2000). Lenders are required to make highly specific disclosures in a form that complies with complex regulations – set forth in TILA (see 15 U.S.C. §§ 1637, 1637a, 1638) and in the interpreting Regulation Z promulgated by the Federal Reserve Board (see 12 C.F.R. Part 226).[2]

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[2] Regulation Z "applies to each individual or business that offers or extends credit when four conditions are met: (i) The credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly; (iii) the credit is subject to a finance charge or is payable by a written agreement in more than 4 installments; and (iv) the credit is primarily for personal, family, or household purposes." 12 C.F.R. § 226.1(c).

Congress established criminal, administrative, and private civil enforcement schemes for TILA. ROHNER & MILLER, *supra*, ¶ 13.01, at 885. Despite congressional intent that administrative enforcement be the primary mechanism to ensure compliance with TILA disclosure requirements (see H.R. REP. NO. 90-1040, 90th Cong., 1st Sess. (1967), reprinted in 1968 U.S.C.C.A.N. 1962, 1976), private civil suits have overwhelmed other enforcement mechanisms. ROHNER & MILLER, *supra*, ¶ 13.01, at 886. Before 1995, liability for a TILA violation was set at (15 U.S.C. § 1640(a)):

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000[.]

Despite the placement of the $1000 cap on liability in sub-subparagraph (ii), federal courts uniformly and correctly understood that the $1000 liability limitation, which was included in the original 1968 enactment (1968 U.S.C.C.A.N. at 1976 (discussing the $1000 cap on civil TILA liability)), applied to the entire subparagraph (A), *i.e.*, both to sub-subparagraph (ii) *and* to sub-subparagraph (i). See Pet. 19-20 (citing authority); Pet. App. 9a-10a.

Expressing special concern about the dangers associated with non-disclosure of information concerning closed-end loan transactions secured by dwellings or real property, Congress in 1995 amended the civil enforcement section to provide *higher* caps on statutory damages in the high-cost home mortgage context. See S. REP. NO. 103-169, 103d Cong., 1st Sess. (1993), reprinted in 1994 U.S.C.C.A.N. 1881, 1886, 1905 ("This

subtitle amends [TILA] to provide new consumer protections for non-acquisition mortgages with high fees or interest rates. * * * [T]he bill provides increased civil liability for failure to comply with the requirements for High Cost Mortgages[.]"). The amendments added a third sub-subparagraph to Section 1640(a)(2)(A), and moved an "or." Currently the liability provision reads:

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[.]

As amended, the statute retained the same arguable ambiguity as to whether the $1000 liability cap covered sub-subparagraph (i), as well as sub-subparagraph (ii); but, in keeping with its concern about loans secured by mortgages on property, Congress made it very clear in sub-subparagraph (iii) that an *increased* cap applied to those loans.

One federal court of appeals addressed the $1000 cap over the first eight years following the amendments. The Seventh Circuit held that the meaning of sub-subparagraphs (i) and (ii) remained untouched by the addition of sub-subparagraph (iii). See *Strange* v. *Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997). The correctness of the Seventh Circuit's interpretation – or the diametrically opposed interpretation reached by a divided panel of the court below – is what is now before this Court.

C. The Proceedings Below

Nigh sued Koons Buick under TILA and other state and federal statutes. Koons Buick counterclaimed for breach of contract, based on Nigh's complete failure to make any payments beyond the initial $4000 down payment. Judge Lee awarded summary judgment to Koons Buick on its breach-of-contract counterclaims against Nigh and on several of Nigh's claims. The suit was tried to a jury on Nigh's TILA claim and a Virginia Consumer Protection Act (VCPA) claim. Pet. App. 2a. Over objections by counsel for Koons Buick, Judge Lee instructed the jury that, if it found that Koons Buick violated TILA, it was required to award Nigh twice the finance charge (without regard to the $1000 cap). Pet. 9. The jury awarded Nigh $24,192.80 on the TILA claim and $4000 on the VCPA claim. Judge Lee then awarded Nigh attorneys' fees and court costs totaling $26,129.10. Pet. App. 53a. Koons Buick's total liability on Nigh's claims came to more than $54,000 (more than $50,000 under TILA alone) – for a canceled used-car transaction in which only $4000 had ever changed hands.

On appeal, a Fourth Circuit panel split 2-1 over whether the $1000 statutory cap on liability applied after 1995 to *loans* (except that narrow class of transactions subject to the higher $2000 cap), or only to *leases*.[3] Pet. App. 10a-13a; *id.* at 17a.

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[3] The panel was forced first to indulge the fiction that the transaction had been "consummated" before the parties had in fact reached a contract, because the TILA violations occurred in the *second* agreement – not the third, which ultimately was the basis for Nigh's contractual obligation to the lender. As the panel observed, "Regulation Z defines consummation as the 'time that a *consumer* becomes contractually obligated on a credit transaction.'" Pet. App. 6a (quoting 12 C.F.R. § 226.2) (emphasis in original). The court then held that, because Nigh had signed the second loan agreement, he had committed himself to a purchase of credit, although the contract was not complete. Of course, as a matter of contract law, that is not so. See *Golding v. Floyd*, 539 S.E.2d 735, 738 (Va. 2001) ("The execution of a formal agreement * * * was a condition precedent to the existence of a binding contract."). And, if the panel did

Looking solely at the confusing language of Section 1640(a)(2)(A), the panel majority noted that the $1000 cap on "liability under this subparagraph" in the pre-amended version of the section had been understood to apply to both sub-subparagraphs – with the word "subparagraph" meaning all of (A). Pet. App. 10a (citing *Mars* v. *Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983)). But the panel read the post-amendment version differently.

The $2000 limitation that Congress placed on sub-subparagraph (iii) meant, in the panels' view, that the $1000 cap on liability that follows sub-subparagraphs (i) and (ii) no longer could be read to apply to *all* of (A) – even though (A) was no more and no less a "subparagraph" than it had always been. According to the panel, Congress's addition of sub-subparagraph (iii) also changed the meaning of sub-subparagraphs (i) and (ii). Pet. App. 11a. The panel concluded that the $1000 cap on liability that had applied to consumer loans in sub-subparagraph (i) since TILA's 1968 enactment now applies only to leases in sub-subparagraph (ii); that the loan transactions that had warranted particular congressional concern, in sub-subparagraph (iii), have a $2000 liability cap; and that for the first time in TILA's 35 years on the books there is *no* cap on TILA liability for errors in consumer loan transactions under sub-subparagraph (i). See Pet. App. 12a-13a. "It could well be," the panel majority conceded, "that Congress

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read Regulation Z as imposing TILA liability for the failure to make disclosures about a transaction that was never consummated, that plainly would be contrary to TILA – which allows liability to be imposed only if credit actually is extended. As one court has said: "In the *Nigh* opinion, the Fourth Circuit * * * neither discusses the official interpretation of 'consummation' under Regulation Z nor Virginia contract law. * * * This Court will defer to the Federal Reserve Board and its interpretation of consummation." *Bragg* v. *Bill Heard Chevrolet, Inc.*, 245 F. Supp. 2d 1235, 1238 (M.D. Fla. 2003) (citing 15 U.S.C. § 1638(b)(1); 12 C.F.R. §§ 226.17(b) & 226.2(a)(13); and 12 C.F.R. Part 226, Supp. 1 (official staff interpretations)). See also Pet. 17 n.13.

did not intend to alter the statutory cap applicable under [sub-] subparagraph (A)(i) [which the panel mistakenly called a "subparagraph"] when it amended the statute in 1995." *Id.* at 13a. Apparently unwilling to undertake the "holistic" inquiry that this Court's cases mandate (*United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.)), the panel majority disclaimed any judicial authority to search for congressional intent by looking beyond what it took to be the interpretation "compelled" by the statutory language. Pet. App. 13a.

Judge Gregory dissented. To him, the facts that the $1000 cap had *always* applied to both sub-subparagraphs (i) and (ii), and Congress did not amend those sub-subparagraphs, compelled the conclusion that the $1000 cap *still* applies to sub-subparagraphs (i) and (ii). Pet. App. 19a. Judge Gregory also believed that the majority's interpretation changed the meaning of the word "subparagraph." *Id.* at 20a-21a. Finally, Judge Gregory pointed to inconsistencies that the panel's new interpretation created in the statute. Because the "under this subparagraph" language was *not* included in the newly appended sub-subparagraph (iii), the new sub-subparagraph was structured differently than the pre-existing ones. Also, the phrase "under this subparagraph" was included in Section 1640(a)(2)(B) – a subparagraph providing limits on class action relief – and clearly referred to all of subparagraph (B). To limit "subparagraph" to sub-subparagraph (ii) in the first instance, but interpret it to mean all of subparagraph (B) in the second, created an internal inconsistency in the statute. *Id.* at 21a. The internally consistent construction, Judge Gregory said, is understanding the $1000 cap as applying to all of subparagraph (A), with sub-subparagraph (iii) carving out a specific exception for a class of loans generating particular congressional concern. That interpretation does no violence to the longstanding statutory scheme. *Id.* at 21a-22a.

SUMMARY OF ARGUMENT

The court below failed even to consider, much less to apprehend, the gravity of its holding that TILA liability for a broad range of consumer loan transactions is no longer capped by the $1000 statutory maximum that Congress imposed in 1968 and has never disturbed. The potential for harm – to consumer lenders, including members of *amici*; to manufacturers dependent on consumer purchasing; to consumers themselves; and to the national economy, which is driven by consumer spending – is difficult to overstate. And the Fourth Circuit's new holding is implicated not simply in the rare circumstances where malfeasant lenders abuse relationships with their customers. It is implicated by a significant percentage of large consumer purchases that take place tens of thousands of times daily in the United States. The danger of this harm can be avoided only if the panel decision is reversed by this Court.

The strict-constructionist theories of statutory interpretation adopted by the majority below depart irretrievably from this Court's precedents. The Fourth Circuit did great violence to the clear meaning and intent of the civil liability provisions of TILA. The Fourth Circuit's holding, which creates a direct split with the Seventh Circuit, cannot be reconciled with the language of the civil liability section taken as a whole; with prior interpretations of unchanged language in the section; or with Congress's clear absence of intent to make any change to a well-understood statutory scheme. And applying the panel's interpretation in everyday uses of the civil liability section produces absurd results.

ARGUMENT

In a manner eerily reminiscent of *Independent Ins. Agents of Am., Inc.* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), rev'd *sub nom. United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993), the panel's opinion stands as a monument to the dangers of slavish adherence to a

particular mode of statutory interpretation that is a caricature of – rather than a faithful following of – this Court's precedents. The panel opinion has produced an untenable result for the entire consumer lending industry. The panel's holding manifests an indifference to Congress's will – which is amply demonstrated in this case by the statutory text and the legislative history – that should not be countenanced. And the harms of increased litigation; increased cost of credit; greater difficulties for would-be borrowers in obtaining credit; and perverse incentives for borrowers-cum-plaintiffs were simply left out of the panel's analysis. For all of these reasons, the Court should grant certiorari and reverse the decision below.

I. If Left Intact, the Panel's Holding Threatens to Have an Enormous and Harmful Impact on the Consumer Lending Industry

A. The panel did not consider the magnitude of the industry that is, under its new rule, subject to uncapped, near-strict liability for TILA violations. As of August 2003, the total outstanding consumer credit in the United States amounted to $1.95 trillion – a total that has been increasing steadily in recent years, from $1.4 trillion in 1998. See http://www.federalreserve.gov/releases/g19/Current (visited October 8, 2003). With increased consumer spending driving hopes for a national economic recovery, a vital consumer credit industry is central to short-term economic growth. See, *e.g.*, *Consumers Still Carrying Load in Economic Recovery*, USA TODAY, August 13, 2003 (Online Edition), http://www.usatoday.com/money/economy. The potential economic harm from the drying up of consumer credit – because it becomes prohibitively expensive or otherwise unavailable – should not be allowed.

Of course, of the trillions of dollars in total consumer credit, the transactions implicated by the panel's new reading of Section 1640(a)(2)(A) are those in which the finance charge totals more than $500 (so that TILA damages of double the finance charge will exceed the $1000 cap that Congress imposed). The average new car loan by commercial banks, as

of August 2003, was financed at 6.77 percent over 48 months; and the average amount financed was $25,407. The total cost of credit on such a loan is about $3665 – thus, exposure under TILA is $7330, or more than seven times Congress's statutory maximum liability. For new auto loan transactions involving finance companies, the average finance rate is 3.56 percent; the total cost of credit is approximately $1890; and TILA liability in the absence of the statutory cap is $3780 – nearly four times Congress's intended statutory liability. See http://www.federalreserve.gov/releases/g19/Current (average loan amounts and annual percentage rates); http://www.bankrate.com (visited October 8, 2003) (calculates finance charges). It is not the extreme case, but the *normal* new auto loan transaction, in which a lawsuit over a technical TILA violation will result in penalties far in excess of the amount that Congress intended.

There are 45 million new and used automobile sales yearly (Pet. 15), of which 17 million are new automobile sales. See Brief of VADA, MNCTDA, and WANADA as *Amici Curiae* 3-4 & n.5 (VADA Brief). A substantial percentage of these sales are financed. See Pet. 15 & n.12. To calculate informally the effect of the panel decision on auto lenders, we will hypothesize that a small percentage of all auto sales (say 0.1 percent) are loan transactions involving TILA violations, a very conservative estimate, according to respondent's counsel, who says that "nearly all" – not a small fraction of – car transactions involve statutory violations. See page 2, *supra*. We also assume that (as calculated above) the average exposure over each transaction increased from $1000 to either $3780 or $7330 (depending on the type of lender), plus any actual damages and attorneys' fees, as a result of the panel's holding that the cap does not apply to transactions under sub-subparagraph (i). On these ultra-conservative assumptions, the industry's increased TILA exposure is between $47.5 and $110 million yearly, on new automobile loans alone. If one percent rather than 0.1 percent of transactions involve violations, the increased exposure is between $475 million and $1.1 *billion*. For the approximately 28 million yearly used-car purchases, the average amount

financed by financing companies (as of August 2003) was $14,632, over 57 months, at an interest rate of 9.77 percent. The average per-loan TILA exposure, before any actual damages and attorneys' fees, is $7430. Again assuming the conservative 0.1 percent violation rate, the increased TILA exposure to the industry for these transactions is $180 million – and $1.8 billion if the violation rate is one percent. These calculations do not take account of other substantial costs of the panel's holding – including increased incentives for plaintiffs and their counsel to search out and sue over technical TILA violations and decreased incentives for lenders to settle. See Pet. 16-17.

The effect on each individual lending institution also is large. In a lending survey taken of members of *amicus* ABA, the average per-institution volume of outstanding, direct and indirect consumer auto loans for the largest lending institutions – those with total assets of $10 billion or more – was $730 million for the year 2000. Outstanding direct and indirect consumer loans for recreational vehicles and boats averaged another $278 million. Total average outstanding credit on just three categories of loans implicated by the Fourth Circuit's new interpretation of TILA comes to approximately $1 billion per large institution – as much as 10 percent of an institution's total assets. For smaller lenders the effect in terms of percentage of assets may be even more substantial.

Of course, the above calculations take into account only auto loans – which comprise (as of 1998) approximately one-third of the total consumer credit outstanding in the United States. See http://www.federalreserve.gov/releases/g19/Current ($1.4 trillion in consumer credit outstanding in 1998); see VADA Brief, *supra*, at 4 & n.9 ($451 billion in auto loans outstanding). But "TILA is applicable to virtually every form of consumer credit transaction," including "home mortgages to small loans to credit card plans[.]" ROHNER & MILLER, *supra*, ¶ 1.01, at 3. Credit-card debt in the United States amounts to an estimated 95 percent of total revolving debt – or, as of August

2003, approximately $690 billion. See http://www.federalreserve.gov/releases/g19/Current; http://www.consumerfed.org/expndcrdit.pdf (visited October 13, 2003) (stating the 95 percent figure). Another such class of credit is the home-equity line of credit, which, as of June 2002, represented $233 billion of consumer debt in the United States. See *Home Equity Debt is Surging*, CONTRA COSTA TIMES, November 18, 2002, reprinted at http://www.bayarea.com/mld/bayarea/business/4546860.htm (visited October 13, 2003). As of June 2002, the average sum borrowed on a home-equity line of credit was close to $60,000, at an average interest rate of seven percent. *Ibid.* The average home-equity line of credit might readily see finance charges far in excess of $500. And, unlike closed-end consumer credit secured by a dwelling, which is subject to the $2000 cap under Section 1640(a)(2)(A)(iii), home-equity lines of credit remain subject to sub-subparagraph (i). The industry will see vastly increased TILA exposure on these loans as well if the Fourth Circuit's decision stands.

B. The complexity of the disclosure requirements under TILA and Regulation Z virtually guarantees that technical violations of their provisions will occur. In fact, it seems that regularly they do. In congressional testimony, a former Chairman of the Federal Deposit Insurance Corporation stated that "the complexity of Regulation Z is such that the FDIC cited more than 2,700 of the 3,500 institutions that we examined in 1994 for at least one violation." *Hearings on S. 650 before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing and Urban Affairs,* 104th Cong., 1st Sess., at 9 (1995) (statement of FDIC Chairman Ricki Helfer) (FDIC Testimony). And Congress has been wary of the challenges the "highly technical" rules pose to lenders:

> Creditors * * * have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the Act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation.

S. REP. NO. 96-73, 96th Cong., 1st Sess. (1979), reprinted in 1980 U.S.C.C.A.N. 280, 281.

Despite regulatory and congressional awareness, the technical nature of the TILA requirements remains. Disclosure requirements for closed-end credit (like the automobile loan at issue in this case) are set forth in 15 U.S.C. § 1638; and, for open-end credit such as credit cards and home-equity lines of credit, in 15 U.S.C. §§ 1637 & 1637a. But the greater complexity comes in Regulation Z, which interprets TILA. That regulation occupies nearly 250 pages in the Code of Federal Regulations. See 12 C.F.R. Part 226. Specific regulations on the disclosures govern the relative size of type on disclosures that are required to be written; the specific language that must be used in the disclosures; the type of information that may be provided with the disclosures; whether disclosures must be oral or written; when disclosures must be made; when and whether disclosures must be updated; whether written disclosures must be given to the borrower to keep or merely to view; and in some cases, specific required terminology. See 12 C.F.R. §§ 226.5a, 226.5b, & 226.17.

Regulation Z also imposes requirements governing the content of disclosures, including the identity of the creditor; the amount financed; a separate itemization of the amount financed broken down by type of charge; the total finance charge; in the case of open-end credit, a complex description of how the finance charge is calculated; the annual percentage rate; in the case of a variable rate, facts related to the variation – and the list goes on. See 12 C.F.R. §§ 226.6 & 226.18. Regulation Z may fairly be termed a "cradle-to-grave" regulation – covering pre-transaction conduct such as advertising; imposing disclosure requirements subsequent to the initial transaction; dictating the

appropriate treatment of credit balances; and establishing consumers' rights of rescission. *Id.* Part 226, Subparts B & C.

As courts and commentators have observed, TILA and Regulation Z together create something of a "trap for the unwary creditor." See John W. Edmonds, III & George W. Taylor, Jr., *Truth and Consequences*, 35 WASH. & LEE L. REV. 367, 391 (1978) ("[TILA] was a well-intentioned statute. Unfortunately, it seems to serve mostly as a trap for the unwary creditor, increasing the cost of credit extensions and eliminating the small credit extender from the market as opposed to achieving benefits for the consumers on whose benefit it was enacted."); see also Pet. 18 (discussing authorities). Respondent's counsel observes on his Internet site that "[n]early every car transaction contains one or more violations of a statute or regulation."[4] The hyper-technicality of the regulations makes it *likely* that significant consumer loan transactions will see violations of TILA (see FDIC Testimony, *supra*); and the near-strict-liability civil enforcement scheme imposes financial penalties for each such violation. Pet. 4. One court noted: "A penalty is imposed on the defendant * * * though it has acted in good faith and despite the fact that plaintiff has sustained no damages." *Wilson* v. *Allied Loans, Inc.*, 448 F. Supp. 1020, 1022 (D.S.C. 1978) (describing TILA litigation as a "puzzle" where prizes are awarded "to those who can uncover the technical defects"); see also *McGowan* v. *King*, 569 F.2d 845, 847 (5th Cir. 1978) ("Once again, despite proper and reasonable efforts to comply, an installment sale creditor falls victim to the complex disclosure requirements of the Truth in Lending Act."). Even before the panel's new interpretation of Section 1640(a)(2)(A), consumers' counsel were not blind to the opportunities to bring TILA suits. See Pet. 17 (noting that shortly after the enactment of TILA, in one year two percent of

[4] See page 2, *supra*. Counsel's Internet site also advertises that these "statutes and regulations" can be used "to escape a bad car deal."

the federal civil caseload arose under TILA). Under the panel's new rule, this can only increase.

TILA claims filed in the federal courts numbered from hundreds to as many as 2000 in the two decades after the enactment of the statute. Pet. 17; see ROHNER & MILLER, *supra*, ¶ 12.01, at 785-786 & n.1. Although primary enforcement was intended to be by administrative agencies (1968 U.S.C.C.A.N. at 1976), private enforcement under Section 1640(a) "quickly became the dominant mode, at least as measured by numbers of lawsuits[.]" ROHNER & MILLER, *supra*, ¶ 13.01, at 886.

The predictable effect of the panel's decision – the exposure of TILA defendants to uncapped punitive liability under Section 1640(a)(2)(A)(i) – already has spread beyond this case. A TILA judgment of $1000 that was imposed in October 2002 for a technical violation of the statute was amended last Spring to the uncapped amount of $13,345.82, plus $18,871 in attorneys' fees – in reliance on the panel decision below. See *Rucker* v. *Sheehy Alexandria, Inc.*, No. 02-466-A, (E.D. Va. March 18, 2003) (Order).[5] As in the case before the Court, the *Rucker* plaintiff did not prove actual damages, and the TILA violation was sheer inadvertence on the part of the lender – in that case, failure accurately to disclose the annual percentage rate on a second retail installment sales contract. The potential for results like this case and *Rucker* is virtually limitless. The panel's new rule allows consumers to enter consumer loans and, if they ever become dissatisfied with their purchase, recover tens of thousands of dollars from lenders regardless of harm to

[5] The *Rucker* court held the $18,871 fee award reasonable in part because of the size of the uncapped statutory recovery for the plaintiff. Therefore, as in this case (see Pet. 12 n.9), the substantial attorneys' fees might be less if liability was capped at $1000, as required by Section 1640(a)(2)(A). Also, before the panel decision, a TILA defendant facing a colorable claim was encouraged to settle for the $1000 statutory maximum and therefore incur little to no liability for attorneys' fees, whereas the increased liability under the Fourth Circuit's decision would greatly reduce the incentive to settle.

the borrower or culpability of the lender. Compare *Sanders* v. *Auto Assocs., Inc.*, 450 F. Supp. 900, 902 (D.S.C. 1978) ("Unfortunately, many [TILA] cases * * * have not been brought by plaintiffs who were misled or misinformed by the loan forms they attack. These plaintiffs merely sought a windfall penalty from a lender by picking apart its loan form word by word in search of a technical deviation from the language of the statutes and regulations.").

Victories for TILA plaintiffs under the panel's new rule will be harmful to consumers nationwide because of increases in the cost of credit. Importantly, there is no reason to believe that the massively increased TILA liability that was brought about by the panel's decision will result in improved disclosures by creditors like members of *amici*. Those institutions already are largely successful at meeting their TILA obligations; and those violations that do occur are the result of the hyper-technical nature of the statutory and regulatory requirements (see pages 11-13, *supra*) and will not be cured by imposing greater punishment. And TILA has already had the effect that it was designed to have, with the universal recognition of the $1000 cap on statutory liability. The first decade of enforcement saw thousands of TILA claims filed yearly, but by 1985 that number had dwindled to 245. See ROHNER & MILLER, *supra*, ¶ 12.01, at 785 n.1. So respondent and others like him will the only beneficiaries of the panel's rule, and the cost of their windfalls will be borne by other consumers. And the windfall for plaintiffs, and for their counsel, is won at the risk of catastrophe to the consumer credit industry – and, thereby, to the national economy.

II. A Principled Reading of TILA and its Legislative History Compels the Conclusion That Congress Intended the $1000 Liability Limitation to Encompass Both Sub-subparagraphs (i) and (ii) of Subparagraph (A) of 15 U.S.C. § 1640(a)(2)

A. The panel opinion is an exercise in *reductio ad absurdum*, making a mockery of the time-honored interpretive

techniques. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute."). By blindly following the *punctuation* of two sub-subparagraphs in the statute, and assuming that the "subparagraph" to which the $1000 limitation applies is sub-subparagraph (ii) rather than subparagraph (A), as it always has been (Pet. App. 10a-13a), the panel misconstrued the literal text *and* ignored essential rules guiding the process of interpretation. "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." SCALIA, *supra*, at 23.

No court – not even the panel below – has ever held that Congress intended to amend the cap on damages when it added the third sub-subparagraph to subparagraph (A). Pet. App. 13a ("It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph [*sic*] (A)(i) when it amended the statute in 1995."). But the panel insisted on looking only to what it took (by misunderstanding the word "subparagraph") to be the facially plain meaning of the statutory text, even when doing so led to a result that Congress plainly did not intend, and a result that could fairly be characterized – were resort to such characterization necessary – as absurd.[6]

This Court, in a unanimous opinion, has expressly disapproved of conducting "plain-meaning analysis" of a statute by looking solely to punctuation, when doing so distorts the statute's true meaning:

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[6] The panel reached this result although the pre-1995 version is susceptible to the same erroneous strict-constructionist reading that the panel applies to the current version – but uniformly was interpreted to impose a cap on liability on both sub-subparagraphs (i) and (ii). See pages 3-4, *supra*.

> A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. Along with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used."

United States Nat'l Bank of Oregon, 508 U.S. at 454 (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.)). But in its exercise of "interpretation," the court below did just what this Court has disapproved.

Commentary supports treating the confusion caused by the 1995 amendments as not altering the meaning of sub-subparagraphs (i) and (ii). "Congress did not change its mind about the meaning of that word [subparagraph], but instead neglected to make the necessary adjustment when it added a third part to accommodate transactions secured by real estate." Elwin Griffin, *Searching for Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 305 (2000). After the panel decision, Professor Griffin has reiterated this view: "Congress merely intended to add a third clause to the subparagraph but neglected to amend the language to accommodate the continuing limitation in parts (i) and (ii). This interpretation seems preferable to treating clause (ii) as the only part that would be subject to the $100/$1000 limitation." Elwin Griffin, *The Truth and Nothing But the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345, 414-415 (2003) (noting the conflict in the circuits between the decision below and *Strange*, 129 F.3d at 947).

Finally, no basis exists to believe that Congress decided to allow the $1000 liability limitation on sub-subparagraph (i) to expire without mentioning such a far-reaching change in the

legislative history and without making any change to the statutory text other than the addition of a third sub-subparagraph. In the amendments giving rise to the panel's mistaken interpretation of the statute, Congress *specifically addressed the $1000 cap* and decided it was not adequate to address the important concerns that arise when lenders seek security in borrowers' homes. Congress therefore added a specific provision (Section 1640(a)(2)(A)(iii)) to increase that cap to $2000 in some circumstances. See *Clay* v. *Johnson*, 77 F. Supp. 2d 879, 885 (N.D. Ill. 1999) (citing *Strange*, 129 F.3d at 947), rev'd on other gnds., 264 F.3d 744 (7th Cir. 2001). But Congress did nothing to the liability cap as it applies to other consumer loans and to leases. By turning a blind eye to all indications of Congress's intent (Pet. App. 13a) – including the statute itself – the panel held that Congress's most startling amendment to TILA was one that Congress never discussed.

B. The panel's reading of Section 1640(a)(2)(A) will inevitably yield untenable results. For example, an innocent, technical violation of TILA in the case of a car *loan* (such as a simple miscalculation of the amount financed) could produce substantial statutory punitive liability under Section 1640(a)(2)(A)(i) – as happened in this case. But even an egregious, intentional violation – or multiple violations (see 15 U.S.C. § 1640(g)) – of TILA in the case of a car *lease* could only produce, at the most, $1000 in statutory damages, under Section 1640(a)(2)(A)(ii). Those results could occur regardless of – and in fact, inversely to – the relative culpability of the lender. Compare *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) ("the degree of reprehensibility" of the conduct is the "most important indicium of the reasonableness of a punitive damages award").

The panel's interpretation causes similar results if we compare loan transactions like the one at issue in this case with loans that are secured by home or real-property mortgages. If a commercial lender enters into a loan transaction secured by a dwelling – a transaction covered by Section 1640(a)(2)(A)(iii)

– and the finance charges on the loan transaction run into the tens of thousands of dollars, the lender's TILA liability is $2000 plus attorneys fees, even if the lender deliberately violates requirement after requirement of Regulation Z. But if an automobile dealership lends money for the purchase of an automobile and neglects to include the expense of tax, tags, and titling in the cost of credit disclosure, the lender's liability under TILA is uncapped – and, as in this case, potentially much greater than on the home loan. This result is directly contrary to Congress's clear intent to provide *additional* liability in the case of loans secured with a house or real property.

Finally, in the class action context, the effects of the panel's interpretation become even more far-fetched. Class-action recovery is capped at "$500,000 or 1 per centum of the net worth of the creditor[.]" Section 1640(a)(2)(B). Therefore, under the panel's interpretation of Section 1640(a)(2)(A), if a lender makes an error in its TILA disclosures in one loan transaction, it is subject to uncapped liability of two times the finance charges – possibly, as in the case before the Court, tens of thousands of dollars. On the other hand, if that same lender has a net worth of $2.5 million, and makes the same error with regard to *multiple* different loan transactions with different borrowers, it is subject to liability capped at one percent of its net worth, or $25,000. The liability in the individual action is the same as the total exposure in the class action. Even removing the net-worth limitation from the above example, for large consumer transactions it will be the exceptional circumstance that recovery to a class member can even come close to uncapped individual recovery. No right-minded plaintiff would ever seek to certify a class under TILA if the decision below were correct, but Congress clearly intended the class action provision to have some effect.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRADLEY NIGH,
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On Petition For Writ of Certiorari
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MOTION TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Virginia Automobile Dealers Association ("VADA"), the Maryland New Car and Truck Dealers Association ("MNCTDA"), and the Washington Area New Automobile Dealers Association ("WANADA"), having not received consent from the Respondent, Bradley Nigh, respectfully move this Court for leave to file the *Brief of Amici Curiae in Support for Writ of Certiorari*, filed this day with the Court.

The United States Court of Appeals for the Fourth Circuit has altered and dramatically magnified the potential liability of a credit grantor under the Truth in Lending Act

("TILA"). The Amici Curiae have a substantial interest in this Court's review under a writ of certiorari. VADA is a trade association representing 585 franchised dealers of new and used automobiles throughout the Commonwealth of Virginia. MNCTDA is an association of approximately 320 Maryland franchised new and used car and truck dealers. WANADA is a nonprofit trade association representing more than 200 franchised new and used vehicle dealers in the Washington metropolitan area which is comprised of the District of Columbia, Northern Virginia, and suburban Maryland. As a multi-jurisdictional association, WANADA shares many members with VADA and MNCTDA.

All three Associations were formed and maintained for the purposes, among others, of promoting the interests of franchised new and used car and truck dealers, encouraging sound business policies in the interest of the public, and fostering sound and constructive governmental legislation and regulation generally. All three Associations are especially interested in this matter. Each of the hundreds of members of the Associations sell motor vehicles, a substantial portion of which are financed through retail installment sale contracts covered by TILA. The question considered has a vital impact on the potential liability of these dealers and the hundreds of thousands of transactions in which they engage annually, which are subject to TILA.

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October 14, 2003

QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act ("TILA") recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A) – despite the lack of any evidence of Congressional intent to effect such change – so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

IDENTIFICATION OF AMICI CURIAE

The Virginia Automobile Dealers Association ("VADA") is a trade association representing 585 franchised dealers of new and used automobiles throughout the Commonwealth of Virginia. The Maryland New Car and Truck Dealers Association ("MNCTDA") is an association of approximately 320 Maryland franchised new and used car and truck dealers. The Washington Area New Automobile Dealers Association ("WANADA") is a nonprofit trade association representing more than 200 franchised new and used vehicle dealers in the Washington metropolitan area which is comprised of the District of Columbia, Northern Virginia, and suburban Maryland. As a multi-jurisdictional association, WANADA shares many members with VADA and MNCTDA.

All three Associations were formed and maintained for the purposes, among others, of promoting the interests of franchised new and used car and truck dealers, encouraging sound business policies in the interest of the public, and fostering sound and constructive governmental legislation and regulation generally. All three Associations are vitally interested in this matter. Each of the hundreds of members of the Associations sell motor vehicles, a substantial portion of which are financed through Retail Installment Sale Contracts covered by the Truth in Lending Act ("TILA"). The question presented has a serious impact on the potential liability of these dealers and the hundreds of thousands of transactions in which they engage annually which are subject to TILA.[1]

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for Amici Curiae authored the brief in whole. No monetary contribution was received toward preparation or submission of the brief, other than monetary contributions by Amici Curiae.

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit ("Court of Appeals") has altered and dramatically magnified the potential liability of a credit grantor under The Truth in Lending Act ("TILA"). TILA, as originally enacted 35 years ago, limited the statutory damages to which a creditor could be subjected to no less than $100 and no more than $1,000. The Court of Appeals in this matter interpreted subsequent amendments to TILA, which revealed no Congressional intention to change these limitations on statutory damages as, in fact, eliminating those limitations for financing transactions not secured by real estate. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119, 126-27 (4th Cir. 2003).[2]

The Court of Appeals' departure from settled law merits review by this Court, pursuant to a writ of certiorari, for the following reasons:

1. The decision of the Court of Appeals, if followed generally, has a potentially adverse impact on credit grantors who must, at substantial cost, radically increase protective safeguards against any conceivable error in TILA paperwork, increasing the cost of credit and even potentially leading to elimination of certain types of credit.

2. In reaching its decision, the Court of Appeals approved the granting of exemplary statutory damages so disproportionate to the actual injury that, if awarded in a civil

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[2] Consent to file this Amici Curiae brief was provided by Koons Buick Pontiac GMC, Inc. (hereinafter "Petitioner"), but not by Bradley Nigh (hereinafter "Respondent"). Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Amici Curiae have submitted to this Court, along with this brief, a Motion for Leave to File Brief *Amici Curiae*.

action they would be constitutionally infirm as a violation of due process.

3. The decision of the Court of Appeals, combined with earlier decisions severely limiting defenses under TILA, creates a statutory scheme of strict liability for oppressive exemplary damages for technical violations of TILA.

FACTS RELEVANT TO THIS BRIEF

The Respondent, Bradley Nigh, visited the dealership of the Petitioner on February 4, 2000 to purchase a vehicle. He chose a 1997 Chevrolet Blazer. He purchased it under a Retail Installment Sale Contract ("RISC 1") that provided for a $4,000 down payment and, in addition, the trade-in of a vehicle that he owned subject to a security interest with an estimated payoff balance of $7,500.[3]

Approximately three weeks later, the Respondent returned to the dealership in response to Petitioner's request, at which time Respondent was presented with another RISC ("RISC 2") that altered the terms and called for an additional $2,000 down payment. Respondent objected, but agreed to sign RISC 2 and to sign a promissory note for the additional down payment. Approximately one week later, Petitioner contacted Respondent, apparently through his brother, and requested that he again return to the dealership to sign a new RISC ("RISC 3"). Petitioner returned to the dealership on March 5. RISC 3 removed from the agreement the $965 charge for a "Silencer" security system listed on RISC 2 that

[3] This discussion of the facts is based upon the facts reported by the decisions in *Nigh v. Koons Buick Pontiac GMC Inc.*, 143 F. Supp.2d 535 (E.D. Va. 2001) and *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003).

had not been contracted for and had not been installed. Petitioner signed RISC 3.

Respondent filed suit against Petitioner as a result of the manner in which the sales transactions were conducted, and Petitioner filed counterclaims for the amounts owed on the promissory note and in excess of the original payoff estimate.

In April 2001, the United States District Court for the Eastern District of Virginia ruled on cross summary judgment motions filed by the parties. *Nigh,* 143 F. Supp.2d 535. Thereafter, the case went to trial.

The trial resulted in an award to Plaintiff under the Truth in Lending Act for $24,192.80 and under the Virginia Consumer Protection Act for $4,000. App. at 37a-38a.[4] Following the verdict, the Court awarded Plaintiff attorney's fees and costs of $26,129.10. App. at 53a.

Petitioner appealed the decision of the United States District Court for the Eastern District of Virginia to the United States Court of Appeals for the Fourth Circuit which affirmed the decision. *Nigh,* 319 F.3d at 129. A later request for *en banc* reconsideration was denied. App. at 55a-56a.

ARGUMENT

I. The Court of Appeals' Decision Has a Potentially Adverse Impact on Credit Grantors.

Billions of dollars in financing for motor vehicles annually may be affected by the decision of the Court of Appeals. In 2002 alone, nearly 17 million new cars and light-

[4] The Petitioner's Appendix in this matter will be referred to hereinafter as "App."

duty trucks were sold at retail in the United States.[5] In Virginia, 415,134 new vehicles were registered in 2002, and in Maryland 412,064 new vehicles were registered in 2002.[6] Annually, nearly twice as many used cars are sold.[7] A very high percentage of all sales are financed. The National Automobile Dealers Association ("NADA") estimates that 70% of new car sales are financed.[8] Consumer borrowing for vehicle purchases has dramatically increased in recent years. In 1989, $290.9 billion in consumer credit resulting from motor vehicle purchases was outstanding, and by 1998, this had increased to $451 billion.[9]

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[5] Between 1998 and 2002, nearly 70 million new cars and light-duty trucks were sold in the United States:

Year	New Vehicles Sold
1998	15,591,793
1999	16,954,924
2000	17,402,486
2001	17,177,789
2002	16,847,237

Automotive News 2003 Yearbook.

[6] *2003 NADA Data Book* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/2003/NADAData_2003.pdf.

[7] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES 2002 1011 (2002) reports total vehicle purchases of 45 million vehicles annually. New car dealers alone sold 11.6 million used cars at retail in 2002. *2003 NADA Data Book, supra* note 6.

[8] National Automobile Dealers Association, *Financing Tips*, at http://www.nada.org/NADAGuides/Finance_Tips.htm.

[9] *2000 NADA Data Book* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/20000/NADAData_2000.pdf (on file with counsel for Amici Curiae VADA and MNCTDA).

The decision of the Court of Appeals can have a dramatic impact on the financing of sales of vehicles by dealers in Maryland and Virginia, in particular, and in the United States as a whole. Prior to this decision, dealers could sell and finance vehicles with the expectation that their potential liability would be limited. There was no serious dissent from the view that exemplary statutory damages for TILA violations were limited to a minimum of $100 and maximum of $1,000. These Associations will neither restate the statutory history, nor argue Congressional intent. Those subjects are fully explored in the Court of Appeals' decision and the accompanying dissent, and the Amici Curiae Associations expect that these will be fully argued by the parties in this matter.

Instead, these Associations wish to focus on the potential impact of this decision. The decision will allow exemplary statutory damages at double, and even triple digit multiples of the actual damage suffered by a borrower. This case provides such an example.[10] The "Silencer" included in RISC 2 that was removed from RISC 3 was a $965 item. The resulting verdict from application of the statutory damage formula without limit was $24,192.80. The application of the statutory damage formula in this case thus led to an award of exemplary damages 25 times the cost of the item that was improperly included in RISC 2 and not delivered with the vehicle.

Given that the exemplary damages are based on the amount of the finance charges and not upon the actual

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[10] In fact, the Respondent in this case suffered no actual damage at all because, under RISC 3, he never paid for the Silencer. As a result, the multiple of compensatory damages to actual damages in this case cannot even be quantified. To avoid a controversy as to whether there was even an injury arising from RISC 2, a question at issue in the case below, the Amici Curiae Associations will use, for the sake of argument, the cost of the Silencer as a basis for comparison to the statutory damages.

damages suffered by a borrower, the multiple of exemplary damages to compensatory damages could have been much higher. For example, had the dealer's noncompliance been inclusion of a $96 item instead of a $965 item, there would have been little impact on the overall finance charge, but the exemplary damages awarded would have been 250 times the actual damages based on the cost of the item.

As another example, in 2002, the average selling price of a new vehicle was $26,163.[11] Financed by an average buyer for five years at an 8% Annual Percentage Rate ("APR") with a 20% down payment, the amount financed would be $20,930, with total finance charges of $4,533. Statutory damages for a technical violation of TILA will be over $9,000, even though there may not be any compensatory damages at all as a result of the transaction described.

Clearly, a potential liability that is so disproportionate to the actual damages that may be suffered by a borrower will cause credit grantors, in this case car dealers and the finance institutions that accept assignment of RISCs entered into by car dealers, to be far more wary of the credit transactions in which they will participate. Creditors will have to consider steps to limit their liability if Congressionally enacted limits are not applicable. For car dealer credit grantors, additional processes will have to be adopted to prevent any conceivable error, since such an error can lead to exemplary damages of a higher multiple to actual injury than can be Constitutionally imposed for even the most heinous tortious activity. *See* Argument II, *infra*, at 9-11. These steps, and the likely addition of personnel required to ensure compliance, will increase the cost of lending which must be borne by consumers.

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[11] *2003 NADA Data Book*, *supra* note 6.

The additional liability may even force creditors to consider whether it is wise to do business with some classes of customers. For example, dealers may be forced to ask whether transacting business with individuals who have poor credit histories will be worth the cost. These consumers generally borrow at higher interest rates, thus raising the finance charges they are paying and raising the potential liability for dealers, in the event of a TILA violation, to a level far in excess of any return possible.

The potentially adverse impact of this decision on those who provide credit will be imposed in the absence of any evidence whatsoever that Congress intended to eliminate the statutory limitation applicable to finance contracts not secured by real estate. This lack of evidence of Congressional intent was the basis for the Court of Appeals decision:

> However, the critical point of law – and it is critical – is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap regardless of its intent.

Nigh, 319 F.3d at 128. To the Court of Appeals, where there was no other evidence of Congressional intent to change the statute, the intent necessary to construe the ambiguous statutory language must be gleaned strictly from the ambiguous language itself.

This decision, which depends on ambiguous statutory language to construe ambiguous statutory language, alters 35 years of creditors' understanding of their liability in the event of noncompliance with the TILA. TILA is a complex statute for which violations can be found irrespective of either the

credit grantor's intent or the true impact on the consumer. *See* Argument III, *infra*, at 12-13. This decision has an incalculable impact upon credit grantors, impacting the individuals to whom they may grant credit, the terms on which credit may be granted, the cost of putting procedures in place for granting credit, and other similar critical issues.

The Court of Appeals' answer to its process of using ambiguous language to construe ambiguous language is that Congress can pass a law to make clear that it never intended to change the law in the first place. However, if there is, in fact, no evidence that Congress had the intent to change the law in the first place, should it not be the duty of the courts to interpret laws in accordance with Congressional intent? It has long been held that the primary goal and rule of statutory construction is to determine the intent of Congress when considering ambiguous statutory language. *See U.S. v. N.E. Rosenbaum Truck Lines*, 315 U.S. 50 (1942); *see also Atlantic Mut. Ins. Co. v. C.I.R.*, 523 U.S. 382 (1998).

This Court should grant certiorari to review the Court of Appeals' decision, a decision which has the potential for substantial adverse impact on the credit system so critical to the economy of this country. Credit grantors should not be subjected to the possibility of exemplary damages when there are actual damages many times the actual injury to the borrower, unless there is clear Congressional intent that such a result was intended. Congress should not be burdened with passing a statute to clarify that it never wished to change the statute in the first place.

II. The Decision Approves Awards of Exemplary Statutory Damages That Are So Disproportionate to the Borrower's Actual Injury That They Would Be Constitutionally Infirm in a Common Law Case.

Under the decision of the Court of Appeals, statutory damage awards that are dozens and even hundreds of times the size of borrowers' actual injuries are a realistic possibility. This Court has repeatedly held that exemplary damages of the magnitude approved by the Court of Appeals, as compared to the actual injury in this case, are a violation of due process. Therefore this Court should grant certiorari to review this decision.

The exemplary damages in this case are 25 times the Respondent's compensatory damages. As already noted, if the "Silencer" system had been a $96 item instead of $965, the exemplary damages would have been 250 times the compensatory damages. If this were a common law case, such an award, judged by the guideposts approved in prior decisions of this Court, would be a violation of due process.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court considered a punitive damages award of $2,000,000 in favor of a purchaser of a motor vehicle which had prior undisclosed damage that reduced the value of the vehicle purchased by $4,000. This Court considered the relationship between that punitive damage award and the compensatory damages suffered in the fraud action filed against the manufacturer of the vehicle. *Gore*, 517 U.S. at 562-570.

In considering the relationship, this Court announced three guideposts to determine whether exemplary damages are disproportionate to the compensatory damages of the Claimant: (1) "the degree of reprehensibility of the

nondisclosure;" (2) "the disparity between the harm or potential harm . . . and [the] punitive damages award;" and (3) the difference between the remedy and "the civil penalties authorized or imposed in comparable cases." *Id.* at 575. This Court has reaffirmed these guideposts in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).

If this were a common law tort case, the award of exemplary damages approved by the Court of Appeals would be found to be a violation of due process when judged by the three guideposts set forth in *Gore*.

Using the first guidepost of the *Gore* test, the statutory violation found in this case was not a reprehensible act. *See Campbell*, 123 S.Ct. at 1521 (outlining factors to consider when measuring the degree of reprehensibility). In signing RISC 2, the Respondent could have suffered an economic loss, but he did not because the Petitioner, finding the problem itself, had the Respondent return to its dealership to sign RISC 3 that removed the "Silencer" from the transaction. The action causing economic damages by Petitioner, which was voluntarily cured by the Petitioner, is hardly the basis for strong punitive sanctions.

Using the second guidepost of the *Gore* test, the exemplary statutory damages awarded in this case are clearly disproportionate to the potential economic loss. The Amici Curiae Associations agree that there is no bright line for determining the appropriate relationship between exemplary damages and compensatory damages; however, this Court has made clear that exemplary damages in the magnitude awarded here are clearly questionable:

> With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm or potential harm to the Plaintiff and the punitive damages assessed, <u>but in practice few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process.</u>

Campbell, 123 S.Ct. at 1516 (emphasis added).

In removing the cap applicable to finance transactions not secured by real estate, the Court of Appeals has, in essence, approved a statutory scheme that allows an award of exemplary damages 25 times that of the economic injury in this case. This Court has repeatedly questioned whether such a huge exemplary damage multiple violates due process.

As to the third guidepost of the *Gore* test, one must look to civil penalties authorized or imposed in comparable cases. That is an odd guidepost to be applied when the case is itself about the remedies that the statute will allow. Nevertheless, had this been a Consumer Leasing Act case, the maximum statutory award would have been $1,000. Likewise, if this had been a case involving financing secured by real estate, the maximum award would have been $2,000.

Sanctioning a statutory scheme allowing exemplary damages that are such a large multiple of the compensatory damages, absent Congressional intent that this be allowed, justifies a full review under a writ of certiorari by this Court.

III. This Decision, Combined with Restrictions on the Bona Fide Error and Cure Defenses under TILA, Creates a Punitive Statutory Scheme of Strict Liability.

Prior court decisions have established TILA as a near strict liability statute, and the decision of the Court of Appeals will allow awards of substantial multiples of actual damages, even when, as here, actual damages are virtually nonexistent. When TILA was enacted, Congress provided two defenses for errors giving rise to potential liability. A creditor who discovers an error, notifies the obligor of the error, and takes action to cure the error will have no liability under the statute. 15 U.S.C. § 1640(b). Similarly, a creditor cannot be held liable for a bona fide error, provided it maintains procedures reasonably adapted to avoid such an error. 15 U.S.C. § 1640(c).

Over the years, the bona fide error defense has been significantly limited. Courts have limited the defense strictly to clerical errors. *See, e.g., Baker v. G.C. Services Corp.*, 677 F.2d 775, 779 (9th Cir. 1982). Moreover, the requirement of evidence showing the establishment of procedures reasonably adapted to avoid any such error has limited the availability of the defense. *See, e.g., Hutchings v. Beneficial Finance Co. of*

Similarly, the defense of curative action under 15 U.S.C. § 1640(b) has been significantly limited. Courts have also limited this defense to clerical errors. *Thomka v. AZ Chevrolet, Inc.*, 619 F.2d 246, 251-52 (3rd Cir. 1980). Moreover, courts have required a certain formality in the notification of errors and the curative documents: "Without notifying the consumer that the May 27 documents contained errors and that the May 29 documents were curative, defendant cannot use § 1640(b) to avoid liability for violating

the [The Truth in Lending] Act." *James v. City Home Service, Inc.*, 712 F.2d 193, 195 (5th Cir. 1983).

Creditors are thus faced with the situation where they can have a technical problem in a TILA contract with no way to cure that problem through a new contract. These creditors will face statutory damage awards that can exceed even the selling price of the product without a way to cure the problem once the contract has been signed.

The decision of the Court of Appeals imposes an interpretation on the statutory scheme which is highly technical and punitive to creditors. Only certain types of errors may be considered clerical errors. Clerical errors will be excused only if there are procedures in place to avoid those errors. And, if there is a problem, simply undoing the problem through another contract is not enough. It must be an error to be cured, and the creditor must follow the formality of giving actual notification of the need to cure the problem and not just actually cure it. A decision allowing substantial exemplary damages in the absence of actual damages is unjustifiably punitive and should be reviewed by this Court.

CONCLUSION

For the reasons stated in the foregoing Brief of *Amici Curiae*, the Virginia Automobile Dealers Association, the Maryland New Car and Truck Dealers Association, and the Washington Area New Automobile Dealers Association request that this Court favorably consider the Petition for Writ of Certiorari by Koons Buick Pontiac GMC, Inc. and grant certiorari.

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion to File Brief *Amici Curiae* and Brief of *Amici Curiae* in Support of Petition for Writ Certiorari was served by first-class mail, postage prepaid on this 14th day of October 2003, in accordance with Rule 29.3 of the Rules of the Supreme Court of the United States, to the following:

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No. 03-377

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IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on the Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A)—though there is no evidence of any Congressional intent to effect such a change—so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Bradley Nigh, Koons Buick Pontiac GMC, Inc., and Household Automotive Finance Corporation. Petitioner Koons Buick Pontiac GMC, Inc., states pursuant to Supreme Court Rule 29.6, that it has no parent companies, subsidiaries, or affiliates.

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BRIEF FOR PETITIONER

For thirty-five years—from the Truth in Lending Act's (TILA) passage in 1968 until the decision of the court below in 2003—the statutory damages remedy that now appears in 15 U.S.C. § 1640(a)(2)(A)(i) has always been constrained by an express provision that the liability it imposes "shall not be less than $100 nor greater than $1,000." Despite this language and a long history of consistent interpretation, the court of appeals below held that the $1,000 cap was rendered inapplicable to clause (i) by a 1995 amendment, which was directed to a different purpose entirely, and which left as they had been (indeed did not even re-enact) the pre-existing clause (i) and the limitation provision in issue.

In announcing this transformation of the statutory damages provision, the court below found it necessary only to parse the specific words of the narrow provision at issue. By ignoring the context, history and purpose of the Act, the court of appeals not surprisingly misconstrued the provision's words, which have an unambiguous plain meaning based on consistent usage in TILA and throughout the United States Code.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-22a) was issued on February 4, 2003 and is reported at 319 F.3d 119 (4th Cir. 2003). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 55a-56a) was issued on July 9, 2003 and is unreported.

The judgment of the United States District Court for the Eastern District of Virginia (Pet. App. 23a-40a) was issued on August 15, 2001 and is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for rehearing and rehearing *en banc* was issued on July 9, 2003. (Pet. App.

55a-56a) The petition for writ of certiorari was filed on September 4, 2003, and granted on January 20, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1640(a) of TILA provides, in pertinent part, that:

> (a) [A]ny creditor who fails to comply with any requirement imposed under this part, . . . with respect to any person is liable to such person in an amount equal to the sum of—
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> (1) any actual damage sustained by such person as a result of the failure;
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> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or
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> (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;
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> (3) in the case of any successful action to enforce the foregoing liability . . . , the costs of the action, together with a reasonable attorney's fee as determined by the court; and . . . .

STATEMENT

A. Overview Of TILA

TILA was enacted in 1968, as part of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1666), to address the lack of uniformity in lender disclosures to consumers, S. REP. NO. 90-392, at 1-2 (1967). TILA is primarily a disclosure statute that requires creditors to disclose the cost of credit in consumer credit transactions using certain uniform terminology. The theory behind the Act is that if the terminology used in credit transactions is standardized, individual consumers can more readily compare credit costs and thus more easily shop for the best credit bargain. *See* Consumer Credit Protection Act § 102.

The "core" of TILA's uniform disclosure requirements involves the "finance charge" (the total cost to the consumer of credit) and the annualized simple rate of that finance charge (the "annual percentage rate").[1] 15 U.S.C. §§ 1605-1606; RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 1.01[1] (2002). Other required disclosures include: (1) time periods in which balances may be repaid without incurring finance charges; (2) the method of determining the balance upon which a finance charge will be imposed; (3) the methods of determining the amount of the finance charge; (4) various dates including payment due

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[1] TILA disclosure rules apply to both open-end credit and closed-end credit. Open-end credit plans are typically credit "plans" which contemplate repeated transactions and impose finance charges from time to time on any unpaid balance (*e.g.*, on-going charge accounts and credit cards). *See* 15 U.S.C. § 1602(i). Closed-end credit transactions generally involve fixed-term obligations such as retail installment sales and direct loans, where credit is extended in connection with a single transaction and is payable over a fixed term (*e.g.*, automobile financing, home mortgages, etc.). *See* RALPH J. ROHNER & FRED. H. MILLER, TRUTH IN LENDING ¶¶ 1.01[1], 5.01[1] (2000).

dates; (5) additional charges that may be imposed; (6) total amounts financed; (7) potential delinquency charges; and (8) descriptions of any creditor security interests related to the transaction. 15 U.S.C. §§ 1637-1639.

The Act applies to virtually every form of consumer credit transaction, *see* Regulation Z, 12 C.F.R. § 226.1(c)(1) (2003), "from home mortgages to small loans to credit card plans to even pawn transactions." ROHNER & MILLER, *supra*, ¶ 1.01. Covered transactions represent an enormous portion of the economy; consumer credit for 2003 alone was $2.04 trillion. *See* Federal Reserve Statistical Release G. 19, *Consumer Credit* (April 7, 2004), *available at* http://www.federalreserve.gov/releases/g19/Current (visited April 15, 2004). As to any particular transaction, the Act's requirements extend to both lending documents created at the initiation of a transaction and subsequent documents, such as periodic statements. 15 U.S.C. §§ 1637-1639.

TILA provides a three-pronged enforcement mechanism: administrative agency enforcement, criminal penalties, and private civil liability. 15 U.S.C. §§ 1607, 1611, 1640. Among these, private civil actions have emerged as by far the dominant means of enforcement. *See* ROHNER & MILLER, *supra*, ¶ 13.01; *see also Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432 (5th Cir. 1998). This is due in part to the fact that TILA establishes in the civil context a remedial scheme of virtually strict liability that requires not only no fault on the part of the creditor but also no damages on the part of the consumer. 15 U.S.C. § 1640.

Creditors who commit violations of the Act's disclosure requirements may avoid strict liability in two limited ways. First, a creditor may correct the errors within 60 days of discovery and notify the consumer of the correction; this, however, is contingent on the consumer's having not yet brought suit or notified the creditor in writing of the error. 15 U.S.C. § 1640(b). Second, the creditor may assume the burden of "show[ing] by a preponderance of the evidence

that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1640(c).[2]

B. Background Of TILA's Statutory Damages Provision

Since its inception, TILA has authorized consumers to seek an automatic award of statutory damages for certain technical disclosure violations of the Act.[3]

1. Early Background (1968-1995)

The original 1968 TILA allowed only for a recovery of "twice the amount of the finance charge in connection with the transaction." This recovery was capped at $1,000 and did not require proof of any injury. In fact, the statute contained no right of recovery for actual damages. In relevant part, the original provision read:

> (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of
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> (1) twice the amount of the finance charge in connection with the transaction, except that the liability

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[2] TILA also affords very minimal arithmetic margins for error that in these limited instances except a creditor from strict liability. *See* 15 U.S.C. § 1605(f)(1)(A) ($100 margin for error in closed-end loans secured by real estate); 12 C.F.R. § 226.14(a) (providing margin for error in APR calculations of 1/8 of 1 percent); *id.* § 226.18(d)(2) ($5 variance for transactions with $1,000 or less financed and up to $10 variance for transactions with $1,000 or more financed).

[3] Pursuant to Section 1640(a), statutory damages are authorized for violations of the following TILA provisions: 15 U.S.C. § 1635; *id.* § 1637(a), (b)(4)-(10), (c), (d); *id.* § 1638(a)(2)-(6), (9).

> *under this paragraph* shall not be less than $100 nor greater than $1,000;

Pub. L. No. 90-321, § 130 (1968) (emphasis added); *see also* H.R. REP. NO. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1976.

In 1974, Congress amended Section 1640(a) to allow for recovery of actual damages and to provide a separate statutory damages provision for class actions.[4] As part of these amendments, Congress relocated the original provision for statutory damages in consumer financing transactions from paragraph (1) of 1640(a) to new subparagraph (A) under 1640(a)(2). In the process of relocating the text to the new subparagraph, Congress removed the phrase "liability under this paragraph," which had been part of the $1,000 cap, and replaced it with the phrase "liability under this subparagraph." The relocated and amended text provided for statutory damages to be determined as follows:

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[4] Congress added this separate provision for statutory damages in class actions in response to a 1972 recommendation by the Federal Reserve Board that the Act be amended to place a tight ceiling on class action liability. *See* Federal Reserve Board, TRUTH IN LENDING ANNUAL REPORT TO CONGRESS FOR THE YEAR 1972, at 31 (1973). *See generally* ROHNER & MILLER, *supra*, ¶ 12.08[1]. The 1974 provision set a maximum class action liability of the lesser of $100,000 or one percent of the creditor's net worth. *See* Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1518 (1974).

Prior to this amendment, "individual plaintiffs had coupled the statutory recovery provided by the Act with the federal class action device in an effort to parlay individual claims of $100 to $1000 into towering class actions demanding as much as one billion dollars in statutory damages." Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418, 418-19 (1977) (footnotes omitted). *See generally* James K. LeValley & Richard K. Walker, *Truth-In-Lending Class Actions Under Amended Section 130*, 24 KAN. L. REV. 471, 475-77 (1976).

> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000;

Pub. L. No. 93-495, § 408 (1974) (emphasis added).

The next amendment of this provision was enacted in 1976 in response to the growing number of transactions in which consumers acquired goods—primarily automobiles—by lease rather than by extension of credit, so that no finance charges were incurred. S. REP. NO. 94-590, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432. At that time, Congress passed the Consumer Leasing Act, which applied truth-in-lending protections to consumer leases. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976).

In amending the statutory damages provision of TILA to cover consumer leases, Congress did not enact an entirely new provision, but instead directed that provision (2)(A) be modified to "insert '(i)' after '(A)'" and to add the text of current clause (ii). Pub. L. No. 94-240, § 4 (1976). With these revisions, provision (2)(A) defined the measure of statutory damages as follows:

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000;

Nothing in the text or legislative history of this 1976 amendment suggested any purpose to render the $100-$1,000 limitation inapplicable to the original "twice the amount of any finance charge" measure of liability. To the contrary, the Senate Report simply explained that the Act was creating for consumer leases a civil penalty "equivalent

in dollar amount to that imposed on other creditors." S. REP. NO. 94-590, at 8, *reprinted in* 1976 U.S.C.C.A.N. 431, 438.

Accordingly, following the 1976 amendment, cases predicating liability on clause (i) consistently found the $100-$1,000 limitation still to apply. *See Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) ("In the event that a creditor fails to [comply with TILA], a consumer may bring a civil action against the creditor [and] may recover twice the amount of the finance charge (but not less than $100.00 nor more than $1,000.00)."); *Cowen v. Bank United, FSB*, 70 F.3d 937, 941 (7th Cir. 1995) (same); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) (same); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981) (same).

2. The Addition Of Clause (iii) In 1995

TILA's statutory damages provision was not amended again until 1995, when Congress added clause (iii). Pub. L. No. 104-29, 109 Stat. 271 (1995). The addition of clause (iii) was part of a much broader series of changes to TILA, which principally concerned home mortgages and was brought about by the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). *See* H.R. REP. NO. 104-193, at 52, 1995 WL 432335, at *52. *See generally* ROHNER & MILLER, *supra*, ¶ 6.01[1]-[3]; Robert A. Cook, *Truth in Lending Act Amendments of 1995*, 49 CONSUMER FIN. L.Q. REP. 239 (1995).

In *Rodash*, the court of appeals held that certain small fees (such as a $22 Federal Express charge) in mortgage lending transactions were required to be disclosed as part of the "finance charge." Because virtually the entire mortgage lending industry had for some time failed to make these disclosures, the industry was exposed to great financial liability in the wake of the decision. *See generally* ROHNER & MILLER, *supra*, ¶ 6.01[2] ("If widely followed, *Rodash* could have had the effect of creating such liability for

hundreds of thousands of loans, requiring the mortgage industry to absorb disastrous losses." (footnote omitted)).

As a result, more than 50 nationwide class actions were filed to seek rescission of mortgages based on *Rodash*-type violations.[5] *See* 141 Cong. Rec. S14567 (daily ed. Sept. 28, 1995) (statement of Sen. D'Amato). In light of these class actions, Congress in the Spring of 1995 enacted a class-action moratorium through October 1, 1995 on TILA claims, recognizing that the financial risks unleashed by *Rodash* could run "as high as $217 billion." 141 Cong. Rec. at H9515 (daily ed. Sept. 27, 1995) (statement of Rep. Roukema).

On the eve of the expiration of the moratorium, Congress—by unanimous consent in both houses—passed the 1995 TILA amendments. *See generally* Robert A. Cook, *Truth in Lending Act Amendments of 1995*, 49 CONSUMER FIN. L.Q. REP. at 239 ("With the moratorium set to expire on Sunday, the House passed the Truth in Lending Act Amendments of 1995 . . . on the previous Wednesday, the Senate acted on Thursday, and the President signed the bill into law on Saturday[.]"). These amendments foreclosed the possibility of class-action suits based on the *Rodash* decision and clarified the requirements of TILA so as to prevent such a situation from recurring. *See generally* ROHNER & MILLER, *supra*, ¶ 6.01[3].

Included in the 1995 amendments was a provision adding clause (iii) to TILA's statutory damages provision.[6] Prior to

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[5] Under TILA, there is a 3-year right of rescission for any non-purchase money mortgage on a consumer's home or dwelling if that mortgage fails properly to disclose the finance charges. *See* 15 U.S.C. § 1635(f). *See generally Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998). The result of rescission is that the security interest becomes void and the consumer is entitled to a full reimbursement of all finance charges thus far paid. *See* 15 U.S.C. § 1635(b).

[6] The provision that amended Section 1640(a)(2)(A) stated in its entirety:

the addition of clause (iii), closed-end mortgages had fallen within the general scope of clause (i) and, therefore, had been subject to the $1,000 cap on statutory damages. *See, e.g., Mayfield v. Vanguard Sav. & Loan Ass'n*, 710 F. Supp. 143, 146-47 (E.D. Pa. 1989); *Brown v. Nat'l Permanent Fed. Sav. & Loan Ass'n*, 526 F. Supp. 815, 822 (D.D.C. 1981), *aff'd in relevant part*, 683 F.2d 444 (D.C. Cir. 1982).

Clause (iii) changed that by doubling that cap to $2,000. Floor statements in the Senate and House noted that "the bill raises the statutory damages for individual actions from $1,000 to $2,000." 141 Cong. Rec. S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); *see also* 141 Cong. Rec. H9515 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum) (same). The House Committee Report explained the change as follows:

> Recognizing the difficulty of proving actual damages and the increase in costs involved in mortgage lending, this amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling . . . .

H.R. REP. NO. 104-193, at 99, 1995 WL 432335, at *99.

Other than the addition of the phrase "not less than $200 or greater than $2,000," the movement of the word "or" to

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Sec. 6 CALCULATION OF DAMAGES

Section 130(a)(2)(A) of the Truth in Lending Act (15 U.S.C. § 1640(a)(2)(A)) is amended—

(1) by striking "or (ii)" and inserting "(ii)"; and

(2) by inserting before the semicolon at the end the following: ", or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000".

Pub. L. No. 104-29 § 6, 109 Stat. at 274.

immediately precede "(iii)," and the updating of a statutory reference included in clause (ii), Congress did not otherwise modify provision (A). Nothing in the legislative history of the 1995 amendment suggested any purpose to remove the longstanding $100-$1,000 limitation from the liability provision of clause (i).

In fact, until the decisions in this case, the addition of clause (iii) had never been understood to have eliminated the $1,000 cap on liability under clause (i). For example, shortly after the passage of the 1995 TILA amendments, the Office of the Comptroller of the Currency issued an official policy announcement to banks and other lending institutions that detailed the changes. With respect to the substantive effect of clause (iii), the announcement provided only that "[p]unitive damages have been increased for transactions secured by real property or a dwelling from a maximum of $1,000 to a maximum of $2,000 (closed-end credit only)." Office of the Comptroller of the Currency, *Truth in Lending Act Amendments of 1995*, OCC-96-01, 1996 WL 33111, at *1 (Jan. 5, 1996) (emphasis added).

Indeed, in 1997 a unanimous panel of the Seventh Circuit Court of Appeals held that "the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A)." *Strange v. Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997).

C. Proceedings Below

On October 3, 2000, Respondent Nigh filed suit against Petitioner Koons Buick Pontiac GMC, Inc. ("Koons Buick"), in the United States District Court for the Eastern District of Virginia. Nigh's suit revolved around his purchase of a used Chevrolet Blazer from Koons Buick in February 2000. Nigh alleged violations of TILA, the Federal Odometer Act (FOA), and the Virginia Consumer Protection Act (VCPA),

as well as common-law causes of action sounding in fraud, conversion, and breach of contract. Koons Buick filed counterclaims for breach of contract and fraudulent and negligent misrepresentation.

During the sales transaction—which went through several permutations and was memorialized in three successive retail installment sales contracts ("RISCs")—a $965 car alarm was mistakenly included in the second RISC. Before the deal closed, however, a prospective third-party lender caught this error and informed Koons Buick, who in turn prepared a third, corrected RISC that deleted any reference to charges for the car alarm. While Nigh personally executed this corrected RISC, he subsequently brought suit under TILA based upon the error in the earlier RISC that had never taken effect.

Prior to trial, the district court threw out virtually all of Nigh's forty-odd factual allegations—including all of those sounding in fraud, conversion, and breach of contract. The only three allegations to survive presented claims under TILA, VCPA, and FOA. *See Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 563, 569 (E.D. Va. 2001); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535 (E.D. Va. 2001). The district court also entered judgment in favor of Koons Buick on two breach-of-contract counterclaims based on Nigh's failure to make promised payments. 143 F. Supp. 2d at 560.

As part of his TILA claim, Nigh sought an uncapped statutory damages recovery under 15 U.S.C. § 1640(a)(2)(A)(i) equal to twice the total finance charges on the earlier RISC. Petitioner objected, arguing that any TILA award to Nigh must be limited to $1,000 under the plain terms of the Act. The district court ruled that liability under Section 1640(a)(2)(A)(i) is not capped at $1,000 (JA 647, 653-55)[7] and instructed the jury that if it found that Koons Buick violated TILA, Nigh was "entitle[d] . . . to receive statutory damages of twice the amount of any finance charge in connection with the transaction."[8] (*Id.* at 670)

On May 3, 2001, the jury returned a verdict in Nigh's favor on the TILA and VCPA claims (although it expressly refused to award punitive damages) and found in Koons Buick's favor on the FOA claim. With respect to the TILA claim, the jury awarded Nigh $24,192.80, which was twice the amount of the finance charges in connection with the second RISC. *Id.* at 756-57. On August 10, the district court awarded Respondent attorneys' fees and court costs in the amount of $26,129.10. (Pet. App. 53a) A final judgment was entered on August 15 and an appeal was then taken. (*Id.*, 37a-39a)

On February 4, 2003, the Fourth Circuit Court of Appeals affirmed the judgment of the district court. (*Id.*, 1a-22a) Among other issues before the court of appeals was the question whether liability under clause (i) of 15 U.S.C. § 1640(a)(2)(A) is capped at $1,000. The court of appeals divided two-to-one on this issue.

The majority affirmed the $24,192.80 award of statutory damages, determining that the $1,000 damages cap described in Section 1640(a)(2)(A) applies only to clause (ii). (Pet. App. 11a) Although acknowledging that prior to the 1995 amendment liability under both clauses (i) and (ii) was

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[7] "JA" refers to the Joint Appendix filed by the parties in the Fourth Circuit.

[8] During deliberations, the jury submitted a question to the court, asking whether it was required to give Nigh twice the finance charges if it found Koons Buick had violated TILA , or whether it "ha[d] the discretion to give a different amount." (JA at 749) The court informed the jury that it did "not have the discretion to award a lesser amount" if it found for Nigh on his TILA claim. (*Id.*, 753)

capped at $1,000, the court of appeals nonetheless concluded that this "interpretation [is] defunct" because of the placement of clause (iii). (*Id.*, 11a) As the majority saw it, the term "subparagraph" has no fixed meaning and, under the statute as amended, must necessarily refer only to § 1640(a)(2)(A)(ii). (Pet. App. 12a) For confirmation, the majority observed that the $200-$2,000 statutory minimum and maximum in clause (iii) "shows that the [$1,000 cap] previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii)." (*Id.*, 11a)

In dissent, Judge Gregory found that the $1,000 damages cap, which had been applied consistently to liability under clause (i) prior to the 1995 amendment, continued to apply under clause (i). (*Id.*, 17a) First, noting the Fourth Circuit's own decision in *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65, 67 (4th Cir. 1983), he reasoned that *Mars* is "still good law because there is no evidence that Congress [in 1995] intended to override" the application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii). (*Id.*, 20a)

Second, he observed that the court's reasoning depends on a finding that the meaning of the word "subparagraph," while neither expressly redefined nor even re-enacted, was implicitly changed by the addition of the new clause (iii), which meant that it could no longer apply to all of (A). (*Id.*, 20a-21a)

Third, he reasoned that "[i]f the $1,000 cap was intended to apply only to (ii) . . . then the inclusion of the phrase 'under this subparagraph' would be superfluous; the meaning of (ii) would be unchanged by its deletion." (*Id.*, 21a)

Fourth, Judge Gregory pointed out that the majority's interpretation of the phrase "under this subparagraph" is inconsistent with the use of the same phrase in Section 1640(a)(2)(B) (concerning class actions). (Pet. App. 21a)

There "the phrase 'under this subparagraph' . . . indisputably applies to all of subparagraph (B)." (*Id.*)

Fifth, he rejected the majority's assertion that reading the phrase "under this subparagraph" as applying to all of provision (A) would render meaningless the separate $2,000 cap on liability under clause (iii). As Judge Gregory explained, "the most logical interpretation of the statute is to read the phrase 'under this subparagraph' as applying generally to [subparagraph (A)], and to read [clause (iii)] as creating a specific carve-out from that general rule for real-estate transactions." (Pet. App. 22a) He also noted that the majority's reading would "dramatically increase creditors' liability exposure under § 1640(a)(2)(A), without any explicit statutory language to support such an increase." (*Id.*, 22a)

The majority either dismissed or ignored Judge Gregory on each point. With respect to the absence of evidence that the 1995 Congress sought to overturn the long-established interpretation of clause (i), the majority responded that it was not the court's "responsibility . . . to determine whether there is evidence that 'Congress intended to override the Fourth Circuit's' precedent (or any circuit precedent for that matter)." (*Id.*, 12a) As for Judge Gregory's argument that the meaning of "subparagraph" did not change with the mere addition of clause (iii), the majority stated simply that "Congress' amendment requires that the reference point of the 'under this subparagraph' clause be the subparagraph of § 1640(a)(2)(A)(ii) and not the subparagraph of § 1640(a)(2)(A)," and added that Judge Gregory's contrary argument "ignore[d] the plain reading of that term." (Pet. App. 12a)

Likewise, in responding to Judge Gregory's argument that the majority's interpretation creates surplusage in the statute, the majority argued that "if the 'under this subparagraph' clause had been omitted from the amended statute, Judge Gregory would have a much better case" for arguing that the

$100-$1,000 limitation applies to liability under clause (i). The majority believed that the use of the term requires reference to the "distinct subparagraph" (ii) (*Id.*, 12a-13a) and ignored altogether Judge Gregory's argument that "subparagraph" as used in the adjacent class-action provision demonstrates that the term has a fixed meaning that applies to the whole of provision (A).

The majority also ignored Judge Gregory's argument that clause (iii) with its separate $200-$2,000 limitation is simply a "carve-out" for real-estate transactions "from the general rule [of $100-$1,000 liability]." The majority did add, however, that it is irrelevant that the $200-$2,000 limitation of clause (iii) does not contain the "under this subparagraph" language. As the majority saw it, the only conclusion to be drawn from this absence is that "the plain language of each [damage cap] must be interpreted individually to ascertain its meaning." (*Id.*, 13a)

In conclusion, the majority stated that:

> It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995. . . . It is the statute, not any inferential intent, that constitutes the law. Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent. In this way, and in this way only, are the constitutional roles of the legislature and the courts respected.

(Pet. App. 13a)

SUMMARY OF ARGUMENT

The decision of the court below is a flamboyant caricature of strict legislative construction, bold in its rejection of any assistance from such interpretive guides as context, history, and "inferential" legislative intent. It is ironic, then—but not really surprising—that the court's error is most apparent on the very grounds on which it stakes its claim, the plain meaning of the particular provision at issue. By ignoring the organic relationship of words and ideas, the court of appeals reached an absurd interpretation of statutory language, which, while perhaps not a model of clarity, is easily understood upon modest circumspection. *See, e.g., United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993).

TILA's statutory damages provision, applicable to specified technical violations without any showing of injury, is the product of legislative accretion. As originally enacted in 1968, it had only a single provision—the one at issue here—which provided for a recovery from consumer creditors equal to twice the finance charge, but confined such recovery to the range of $100 to $1,000.

As relevant here, this statutory damages provision was first amended in 1976 to add a second measure of recovery pertaining to lease transactions, for which no such remedy then existed because no finance charge is involved. The $100-$1,000 limitation was moved then to follow the lease-related remedy, but otherwise remained unchanged. Following the 1976 amendment, and until the decision below, all courts have agreed that the liability limitation continued to apply to recoveries under both provisions, then and now found at 15 U.S.C. § 1640(a)(2)(A)(i) and (ii).

In 1995, based on a perception that somewhat greater recoveries were appropriate in the case of transactions secured by real property—which had previously been encompassed in the original remedy provision of clause (i)—Congress enacted a third provision, directing that it be

appended at the end of the existing subparagraph (A), and that the word "or" be moved to precede this third and final clause. It is this 1995 amendment, which called for a $200-$2,000 limitation on such mortgage transactions, that the court below held to have exempted Section 1640(a)(2)(A)(i) from the $100-$1,000 liability limitation.

Whatever else one might say about Section 1640(a)(2)(A) following the 1995 amendment, it continued to provide expressly that "liability under this subparagraph shall not be less than $100 nor greater that $1,000," and that is dispositive of this case. For everywhere the word "subparagraph" appears in TILA, it has a specific and unambiguous meaning making reference to those subdivisions of a statutory section that begin with a capitalized alphabetical letter. As the dissent pointed out, this particular meaning is apparent from the immediately adjacent subparagraph, Section 1640(a)(2)(B). Unless the word "subparagraph" is to have a unique meaning in Section 1640(a)(2)(A), different from every other usage in the Act, it must there mean that the liability limitation extends to subparagraph (A) as a whole, and is not limited, as the court below held, to what it referred to as "subparagraph (ii)."

This consistent usage of "subparagraph" in TILA is part of a larger scheme of nomenclature that assigns similar precise meanings to other divisions within the statutory hierarchy—sections, subsections, paragraphs, subparagraphs, and clauses, for example. Nor is it confined to TILA. The same hierarchy is found throughout the United States Code. Nor is it so by accident. Manuals exist for both the House and Senate that strictly define the meaning of these terms, and numerous books have been written making precisely the same point. "Subparagraph" is a term of art in the drafting of federal legislation. Where it is used, the reference is to a statutory division that begins with a capital letter of the alphabet.

This plain meaning of "subparagraph" comports with the overall design of Section 1640(a)(2)(A). The broad language of clauses (i) and (ii) of the subparagraph manifestly addresses all consumer transactions reached by TILA. Clause (iii)'s $2,000 cap for closed-end mortgage transactions—which was added in 1995—is simply a specific exception to the $1,000 cap otherwise applicable to all consumer finance transactions. This contextual understanding of clause (iii) is further confirmed by the absence of the phrase "under this subparagraph" in clause (iii), making clear that the $200-$2,000 limitation applies *only* to clause (iii), and not the whole of subparagraph (A).

Reading Section 1640(a)(2)(A) according to its plain meaning avoids odd and even potentially unconstitutional results, which would otherwise obtain under the Fourth Circuit's interpretation. Without the $1,000 cap, clause (i) would allow individual recoveries running into the tens of thousands of dollars based on virtually strict civil liability. Such large recoveries would render nearly useless TILA's class-action provision, Section 1640(a)(2)(B), where total class recoveries may never exceed $500,000. Since the recoveries in issue bear no relationship whatsoever to actual damages, the resulting statute may also be suspect under constitutional due process standards.

The plain meaning of Section 1640(a)(2)(A) is confirmed by its legislative history, which reveals that Congress never departed from its intention that the $1,000 cap continue to apply to liability under clause (i). From TILA's passage in 1968 until the 1995 amendment adding clause (iii), the $100-$1,000 limitation of subparagraph (A) indisputably applied to both clauses (i) and (ii). Moreover, the 1995 amendment served only to double statutory damages for closed-end mortgages, but did not otherwise alter or re-enact the existing statutory language. Critically, the legislative history makes no mention whatsoever of removing the $100-$1,000 limitation from liability imposed under clause (i), even as it

addressed specifically the much less consequential doubling of the cap by enacting clause (iii).

Finally, reading Section 1640(a)(2)(A) in contravention of its plain meaning would reduce the availability of credit, harm consumers, and impede economic growth. It is predictable that the cost of uncapped liability under clause (i) would be passed through to consumers in the form of increased credit costs generally. As a result, high-risk credit consumers would be further marginalized from the consumer credit market as creditors pass through to them the perceived risk of a disproportionately higher statutory damage recovery attendant to each loan. More generally, this contraction of credit would be a net drag on overall economic growth.

ARGUMENT

The question before this Court is whether the statement at the end of Section 1640(a)(2)(A)(ii) "that the liability under this subparagraph shall not be less than $100 nor greater than $1,000," applies to provision (ii) alone—as the court of appeals held—or to both provisions (i) and (ii). The answer turns on whether "this subparagraph" refers to Section 1640(a)(2)(A), thereby encompassing both provisions (i) and (ii)—or exclusively to provision (ii).

I. UNDER THE PLAIN LANGUAGE OF TILA, THE $1,000 CAP APPLIES TO CLAUSE (i)

As this Court has repeatedly admonished, statutory interpretation begins with the text itself. *See, e.g.*, *Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004) ("The starting point in discerning congressional intent is the existing statutory text."); *accord Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). If the text "is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.'" *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (citations omitted). If a word or phrase either is a "term of art used in many statutes" or has a "long history in federal administrative law," there is a presumption

that this meaning applies. *See, e.g., Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995).

Furthermore, statutory construction "is a holistic endeavor," *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and thus "statutory language must always be read in its proper context" and not "viewed in isolation," *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). "'In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citation omitted); *see also Holloway v. United States*, 526 U.S. 1, 6 (1999) ("In interpreting the statute at issue, '[w]e consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'"). Where the presumptive meaning of a legislative term of art is confirmed by the overall language and design of the statute, a plain meaning exists and is controlling.

Applying these well-established principles of interpretation here, the phrase "liability under this subparagraph" has a plain meaning that makes clear that the $1,000 cap in Section 1640(a)(2)(A) applies to both clauses (i) and (ii).

A. The Text Of TILA Makes Clear That "Liability Under This Subparagraph" Refers To Liability Under Provision (A)

Congress generally adheres to a fixed hierarchical scheme in subdividing statutory sections. *See generally* Lawrence E. Filson, *The Legislative Drafter's Desk Reference* 222 (1992).

These hierarchical divisions are consistently introduced as follows:

§ . . . .

(a) . . . .

(1) . . . .

(A) . . . .

(i) . . . .

Looking first to the legislation at issue, as this Court has directed, *see, e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), TILA not only utilizes these hierarchical divisions, but also consistently uses precise terms to differentiate and reference each level of this hierarchy. In descending order, these terms are "section," "subsection," "paragraph," "subparagraph" and "clause." For example, TILA uses the term "subsection" 117 times, and in each instance the term serves as a reference to the first level subdivision beginning with a lower-case letter. Likewise, the term "paragraph" is used 61 times and consistently refers to the second level subdivision beginning with a cardinal number.[9]

Critically for purposes of this case, every use of the term "subparagraph" in TILA—32 times in all—references a third level subdivision that begins with a capitalized alphabetical

[9] These figures includes instances where TILA provides a subdivision reference together with a multi-level breakdown, such as "paragraphs (1)(A), (3)(B)(i)(I), (4)(A), and (4)(C)(i)(I)," *see, e.g.*, 15 U.S.C. § 1632(c), or "subparagraph (A)(iii)," *see, e.g.*, *id.* § 1638(a)(2)(B)(iv). As both the House Manual and the Senate Manual on legislative drafting explain, "[i]f the reference is to more than 1 unit, the reference is to the senior unit. Thus, refer to section 5(a)(1) and not paragraph 5(a)(1)." *House Legislative Counsel's Manual on Drafting Style* § 341(F)(2), at 52 (2d ed. 1995). (Addendum ("Add.") at 6A) *See also* United States Senate Office of the Legislative Counsel, *Legislative Drafting Manual* § 129(d)(1), at 43 (1997). (Add. 10A) *See generally infra*, Part I.B.

letter.[10] One such usage of the word appears in section 1640(a)(2)(B), immediately following section 1640(a)(2)(A).[11] Like provision (A), provision (B) includes the phrase "under this subparagraph." As used in provision (B), the term "subparagraph" indisputably refers to all of (B),

[10] The references to "subparagraph" in TILA are as follows: 15 U.S.C. § 1602(aa)(2)(A) ("under this subparagraph"); *id.* § 1602(aa)(2)(B) ("under subparagraph (A)"); *id.* § 1602(aa)(2)(C) ("in subparagraph (A)"); *id.* § 1605(f)(2)(A) ("except as provided in subparagraph (B)"); *id.* § 1606(a)(1)(B) ("under subparagraph (A)"); *id.* § 1615(c)(1)(B) ("pursuant to subparagraph (A)"); *id.* § 1632(c)(2)(B) ("under subparagraph (A)"); *id.* § 1632(c)(2)(B)(ii) ("subject to subparagraph (C)"); *id.* § 1637(c)(1)(B) ("under subparagraph (A)"); *id.* § 1637(c)(2)(B) ("Subparagraph (A) shall not"); *id.* § 1637(c)(3)(A) ("requirements of subparagraph (B), (C), or (D)"); *id.* § 1637(c)(3)(B) ("described in subparagraph (A)" and "requirements of this subparagraph"); *id.* § 1637(c)(3)(C) ("described in subparagraph (A)"); *id.* § 1637(c)(3)(D) ("required by subparagraphs (A) and (B)"); *id.* § 1637(c)(3)(E) ("referred to in subparagraph (B), (C), or (D)"); *id.* § 1637(c)(4)(B) ("disclosed under subparagraph (A)"); *id.* § 1637(c)(4)(C)(i)(I) ("described in subparagraph (A)"); *id.* § 1637(c)(4)(C)(i)(II) ("described in subparagraph (B)"); *id.* § 1637(c)(4)(D) ("in subparagraphs (A) and (B)"); *id.* § 1637(d)(2)(B) ("under subparagraph (A)"); *id.* § 1637a(a)(6)(C) ("under this subparagraph"); *id.* § 1637a(a)(7)(B) ("described in subparagraph (A)"); *id.* § 1637a(a)(8)(B) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1637a(a)(8)(C) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1638(a)(2)(B) ("of this subparagraph"); *id.* § 1638(a)(2)(B)(iv) ("the preceding subparagraph (A)(iii)"); *id.* § 1639(b)(2)(B) ("pursuant to subparagraph (A)"); *id.* § 1640(a)(2)(A) ("under this subparagraph"); *id.* § 1640(a)(2)(B) ("under this subparagraph"); *id.* § 1666(a)(3)(A) ("in subparagraph (B)"); *id.* § 1667c(c)(2)(B) ("under subparagraph (A)(iii)").

[11] Section 1640(a)(2)(B) provides in pertinent part:

> (B) in the case of a class action, such amount as the court may allow, except that . . . total recovery *under this subparagraph* in any class action or series of class actions . . . shall not be more than . . . .

15 U.S.C. § 1640(a)(2)(B) (emphasis added).

because the provision has no subdivisions to which the term "subparagraph" could otherwise apply.

It is a general principle of statutory construction that ""identical words used in different parts of the same act are intended to have the same meaning."" *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. at 460 (citation omitted). *See, e.g., Comm'r v. Lundy*, 516 U.S. 235, 249-50 (1996) (same); *Sullivan*, 496 U.S. at 484 (same). Since, in TILA, "subparagraph" always refers to a third level subdivision introduced with a capital letter, in the context of Section 1640(a)(2)(A)'s $1,000 cap on "liability under this subparagraph," "subparagraph" plainly refers to provision (A), and not just to provision (ii).

Consistent with this hierarchical organization, subdivisions in TILA demarcated by lower-case roman numerals are consistently referenced by the term "clause."[12] Indeed, even in Section 1640 the term "clause" is used to reference subdivisions demarcated by lower-case roman numerals. *See, e.g.*, 15 U.S.C. § 1640(i)(1)(B)(ii) ("described in clause (i)"); *id.* § 1640(i)(2)(A) ("described in clause (i) or (ii)") Thus, if the $1,000 cap were intended to apply only to provision (ii), the text at the end of provision (ii) would have referenced "liability under this clause," not "liability under this subparagraph."

In sum, TILA as whole manifests a consistent and precise nomenclature to reference the Act's various levels of subdivision, *i.e.*, "(a) subsection"; "(1) paragraph"; "(A) subparagraph"; and "(i) clause." "Congress obviously chose

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[12] *See, e.g.*, 15 U.S.C. § 1637 (c)(1)(A)(iv)(II) ("to carry out this clause"); *id.* § 1637a(a)(6)(B)(iii) ("described in clause (i)"); *id.* § 1637a(a)(8)(B) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1637a(a)(8)(C) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1640(i)(1)(B)(ii) ("described in clause (i)"); *id.* § 1640(i)(2)(A) ("described in clause (i) or (ii)"); *id.* § 1667c(c)(1)(C)(ii) ("referred to in clause (i)(II)").

these terms carefully" and, in so doing, established a plain meaning for each. *Estate of Flanigan v. I.R.S.*, 743 F.2d 1526, 1530 (11th Cir. 1984). There is no justification for departing from this uniform terminology.

B. In Using "Subparagraph" To Refer To Provision (A), TILA Follows The Uniform Federal Legislative Drafting Practice

This nomenclature used throughout TILA to differentiate and reference its subdivisions is also used generally throughout the United State Code. *See, e.g., Estate of Flanigan*, 743 F.2d at 1530 ("Section 2055 differentiates between the terms 'section,' 'subsection,' 'paragraph,' and 'subparagraph.'"). Not only does the term "subparagraph" have a plainly apparent meaning in TILA but it also has this same well-established meaning in all federal legislation. That fact is highly relevant in ascertaining the meaning of the word as relevant here. *See, e.g., W.V. Univ. Hosps. v. Casey*, 499 U.S. 83, 88-92 (1991) (searching the United States Code to confirm the general "statutory usage" of "attorney's fees and expert fees").

Official legislative drafting manuals confirm the consistent practice followed by the Senate and the House.[13] The Senate *Legislative Drafting Manual* provides in pertinent part that:

> A section is subdivided and indented as follows:
>
> (a) SUBSECTION.–
>
> (1) PARAGRAPH.–
>
> (A) SUBPARAGRAPH.–
>
> (i) CLAUSE.–

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[13] Pursuant to Supreme Court Rule 32(3), Petitioner, by letter of April 19, 2004, has offered to lodge full copies of the Senate Manual and the House Manual with the Court. Relevant excerpts from these manuals are found in the attached Addendum to this brief.

United States Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 10 (1997). (Add. 9A)

Precisely the same hierarchy and terminology is set out in the House of Representatives' *Manual on Drafting Style*:

> IN GENERAL.—To the maximum extent practicable, a section should be broken into—
>
> (A) subsections (starting with (a));
>
> (B) paragraphs (starting with (1));
>
> (C) subparagraphs (starting with (A));
>
> (D) clauses (starting with (i)); . . . .

House of Representatives Office of the Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* 24 (2d ed. 1995). (Add. 3A) The House Manual also expressly instructs that "indented items within the class designated '(A), (B), (C) . . .' should be consistently referred to as subparagraphs." *Id.* at 51. (Add. 5A)

Other sources likewise make clear that Congress uniformly adheres to this organizational scheme and terminology, including consistent usage of the word "subparagraph." For example, the United States Congress Data Dictionary of Legislative Drafting Documents, which is available on the official House of Representatives internet page, states that:

> Federal legislation is highly structured. The basic unit is the section. Sections can contain seven (7) levels of hierarchy within them (subsection, paragraph, subparagraph, clause, subclause, item and subitem).).

Available at http://xml.house.gov/drafting.htm (last visited April 15, 2004) That same resource expressly defines the term "subparagraph:"

> A hierarchical structure of a measure. This level is contained directly with[in] paragraphs. Levels contained within subparagraphs are clauses, subclauses, items, and subitems. *Subparagraphs are normally enumerated with an uppercased alpha character within parentheses (e.g., (A)).*

Available at http://xml.house.gov/subparagraph.html (last visited April 15, 2004) (emphasis added).[14]

Numerous unofficial sources are to the same effect. For example, the former Deputy Legislative Counsel of the U.S. House of Representatives, in his *Legislative Drafter's Desk Reference*, has stated that, "[i]n Federal statutes—regardless of the style in which they are written—sections that need to be subdivided are *always* broken down successively" according to this scheme. *Id.* at 222 (emphasis added). He also noted "[t]he designation of the inferior subdivisions follows the standard practice, with each such designation consisting simply of a letter or number enclosed in parenthesis—'(a)' for a subsection, '(1)' for a paragraph, *'(A)' for a subparagraph*, '(i)' for a clause, and '(I)' for a subclause." *Id.* at 402 (emphasis added).[15]

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[14] The United States Congress Data Dictionary of Legislative Documents defines a "clause" as:

> A hierarchical structure of a measure. This level is contained directly with[in] subparagraphs. Levels contained within clauses are subclauses, items, and subitems. *Clauses are normally enumerated with lowercased roman-numeral values within parentheses (e.g., (ii)).*

Available at http://xml.house.gov/clause.html (last visited April 15, 2004) (emphasis added).

[15] For further and earlier references to the same consistent practice, *see, e.g.*, Donald Hirsch, *Drafting Federal Law* § 3.8, at 27 (2d ed. 1989) ("Paragraphs are divided into tabulated lettered subparagraphs ('(A)', '(B)', etc.) . . . . Subparagraphs are divided into clauses bearing small roman numerals ('(i)', '(ii)', '(iii)', '(iv)'), that are, in turn, divided into clauses . . . ."); Maxwell J. Mehlman & Edward G. Grossman, *Yale Legislative Services Handbook of Legislative Drafting* 100 (1977) ("A section is sometimes broken down beyond the 'paragraph' into 'subparagraphs' (enumerated with capital letters in parentheses; e.g., '(A)') and 'clauses' (enumerated with lower-case letters in parentheses;

A Westlaw research query for the phrase "under this subparagraph" in the United States Code database confirms that these numerous legislative sources are firmly grounded in reality. In the 716 statutes that include the phrase "under this subparagraph," the word "subparagraph" is virtually always used according to its well-established meaning—*i.e.*, a third-tier subdivision of a statutory section demarcated by a capitalized alpha character.

Accordingly, the long-established and consistent meaning of the word "subparagraph," as used within TILA and throughout the United States Code leads inexorably to the conclusion that the $1,000 limitation in § 1640(a)(2)(A)(ii) applies to provision (A) generally, and not merely to clause (ii).

C. The Plain Meaning Of "Subparagraph" Is Consistent With The Overall Design Of Provision (A)

The decision below ruled out the possibility that the $1,000 limitation could apply to provision (A) generally, on the ground that such reasoning would "render meaningless the maximum and minimum articulated in (iii)." (Pet. App. 11a) But a careful reading of the related provisions in context with each other makes clear that clause (iii)'s $2,000 cap is a narrow and specific exception to the $1,000 cap, applying only to closed-end mortgages covered by clause (iii). *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("'Words are not pebbles in alien juxtaposition; they

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e.g., '(i)')."); Reed Dickerson, *Legislative Drafting* 73-74 (1977 (originally published in 1954)) ("For divisions of a subsection (called 'paragraphs'), use '(1),' '(2),' '(3),' etc. For divisions of a paragraph (called 'subparagraphs'), use '(A),' '(B),' '(C),' etc."); James Craig Peacock, *Notes on Legislative Drafting* 12 (1961) (referencing that "paragraphs [are] designated (1), (2), (3)," "sub-paragraphs [are] designated (A), (B), (C)," and "clauses (i), (ii), (iii)").

have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)).

First, by their terms, clause (i) applies to all consumer transactions involving a finance charge and affords a recovery of "twice the amount of any finance charge" capped at $1,000, and clause (ii) applies to all consumer lease transactions, affording a statutory damages recovery likewise capped at $1,000. Thus, together, clauses (i) and (ii) on their face cover the entire field of consumer transactions reached by TILA.

Clause (iii) addresses specifically closed-end mortgage loans, otherwise covered by clause (i), and affords this sub-class of consumer financing transactions a higher $200-$2,000 statutory limitation. Indeed, that clause (iii) only operates as a carve-out allowing a higher liability window for certain transactions already referenced in clause (i) is apparent from the fact that clause (iii) itself does not include any measure of damages. Rather, clause (iii) relies on clause (i)'s "twice the amount of any finance charge" calculation, which by the terms of clause (i) applies to all consumer finance transactions. *See, e.g.*, *In re Ralls*, 230 B.R. 508, 522 (E.D. Pa. 1999) (holding that statutory damages under clause (iii) "are measured by double the amount of the finance charges imposed in the transaction up to $2,000"). Clause (iii) then simply restricts doubled finance charges to a window of $200-$2,000.

Thus, clause (iii) in substance is simply a limited exception to transactions that are otherwise covered on the face of clause (i). *See* Pet. App. 22a (Gregory, J., dissenting) ("[T]he most logical interpretation of the statute is to read the phrase 'under this subparagraph' as applying generally to [subparagraph (A)] . . . and to read [clause (iii)] as creating a specific carve-out from that general rule for real-estate

transactions."); *see also Strange*, 129 F.3d at 947 ("In our view, the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damages awards for [clauses (i) and (ii)].").

Second, this reading is further confirmed by the fact that, had Congress intended the $1,000 cap to apply only to liability under clause (ii), the words "under this subparagraph" would have been completely unnecessary. (Pet. App. 21a (Gregory, J., dissenting)) Without the words "under this subparagraph," the $1,000 limitation could only have been read to apply to clause (ii). Thus, if "subparagraph" were intended to refer only to clause (ii), not only would this use be completely inconsistent with the term's plain meaning, but also the phrase would be superfluous. This "means, of course, that such a reading must be rejected." *See, e.g., FCC v. NextWave Pers. Communs., Inc.*, 537 U.S. 293, 302 (2003).

Third, it is also quite significant that the $2,000 cap in clause (iii)—which all agree applies only to that clause—does not include the phrase "under this subparagraph." By omitting that phrase, the drafters rendered the $200-$2,000 limitation applicable only to clause (iii), while the $100-$1,000 limitation after clause (ii) was expressly made applicable to the remainder of subparagraph (A)—that is clauses (i) and (ii).

D. Reading "Subparagraph" According To Its Plain Meaning Avoids Odd And Potentially Unconstitutional Results

It also bears noting that the Fourth Circuit's singular construction of the word "subparagraph" produces consequences under the Act that are at best extremely odd, and at worst, unconstitutional.

Reading clause (i) without the $1,000 cap will produce many recoveries running into the tens of thousands of dollars, for highly technical violations that give rise to strict

liability. Moreover, these windfall awards would bear no relationship whatsoever to actual damages, and, indeed, would be available in addition to actual damages. *See* 15 U.S.C. § 1640(a)(1).

As an example, here Nigh recovered $24,192.80 in statutory damages despite the fact that he proved no actual damages and despite the fact that the only alleged TILA violation was the erroneous inclusion of a $965 Silencer product on a retail installment sales contract that never even took effect, and on which no money was ever paid. It is at best strange that such a recovery would be allowed in this case, while liability based on the lease of a similar vehicle would be capped at $1,000, and a cap of $2,000 would apply if the dealer had the foresight to secure the whole transaction with a mortgage on the purchaser's home.

Further, absence of the $1,000 cap on liability imposed in individual actions under clause (i) would, as a practical matter, largely eliminate the utility of the class-action provision of Section 1640(a)(2)(B). As discussed above, the class action provision states "recovery under this subparagraph" "shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." *See supra* footnote 4. For example, if a class action with 1,000 members were brought, the *maximum* average recovery per class member would be $500 ($500,000/1,000); however, were class members to pursue their claims individually under clause (i), each member's recovery for the same violations could, under the Fourth Circuit's construction, easily run well into the thousands of dollars. This differential creates not only a substantial likelihood for opt-out in class actions certified under Federal Rule of Civil Procedure 23(b)(3), but calls into question whether such class actions would even meet the superiority inquiry of Rule 23(b)(3), since pursuit of individual actions under clause (i) would plainly and routinely offer a far greater recovery. *See* Fed. R. Civ. P. 23(b)(3).

Also troubling is the risk that many of these windfall recoveries could be constitutionally suspect, as this Court has similarly held where jury awards of exemplary damages were excessive. *See, e.g., State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This offers yet another reason why "subparagraph" should be accorded its usual meaning here. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.").

II. THE HISTORY OF SECTION 1640(a) CONFIRMS THAT THE $1,000 CAP CONTINUES TO APPLY TO LIABILITY UNDER CLAUSE (i)

The evolution and legislative history of TILA's statutory damage provision confirm both that the $1,000 cap was originally intended to apply to liability under what is now clause (i) and that Congress has never departed from this intention. *See, e.g., Reno v. Koray*, 515 U.S. 50, 59 (1995) (relying on "context and history" of a statutory section to confirm its meaning).

When first enacted in 1968, TILA only provided the statutory damage recovery now found in clause (i)—*i.e.*, "twice the amount of the finance charge in connection with the transaction."[16] Importantly, this statutory damage

[16] In relevant part, the original provision read:

> (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability *under this paragraph* shall not be less than $100 nor greater than $1,000;

provision, which was located at Section 1640(a)(1), provided that "liability under this paragraph"—referring there to paragraph (1)—shall not be less than $100 nor greater than $1,000. Since the only liability provided for in paragraph (1) was "twice the amount of the finance charge," there was never any question that this recovery was capped at $1,000.

In 1974, Congress relocated TILA's statutory damages provision from 1640(a)(1) to new provision 1640(a)(2)(A). In doing so, Congress removed the phrase "liability under this paragraph" and replaced it with "liability under this subparagraph."[17] Pub. L. No. 93-495, § 408, 88 Stat. at 1518. This careful change in terminology to correspond with the relocation of the text to subparagraph (A) makes apparent that Congress intended the $1,000 cap to apply to the whole of provision (A). And of course, this action by Congress was entirely consistent with its long-established usage of the words "paragraph" and "subparagraph."

Congress' 1976 amendments to Section 1640(a), adding a cause of action relating to lease transactions, changed none of this, and the $1,000 cap continued to apply to the whole of subparagraph (A). All that Congress did in 1976 was to modify provision (A) to "insert '(i)' after '(A)'" and to add the text of current clause (ii). Neither the text of clause (i) nor the statutory damage cap was otherwise changed.[18] Pub.

Pub. L. No. 90-321, § 130, 82 Stat. at 157 (1968) (emphasis added).

[17] The relocated and amended text provided:

> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000;

[18] With these revisions, provision (A) read in pertinent part:

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case

L. No. 94-240 (1976). Further, the legislative history expresses only an intent to add a provision allowing a statutory recovery for leases that was capped at $1,000. *See* H.R. REP. NO. 94-872, at 10, *reprinted in* 1976 U.S.C.C.A.N. 442, 445-46. It makes no mention of eliminating the $1,000 cap from clause (i). Thus, "[c]ourts uniformly interpreted the . . . $100 minimum and the $1,000 maximum[] as applying to both (A)(i) and (A)(ii)." *Strange*, 129 F.3d at 947.

There is every reason to assume that Congress, in 1995, was aware of this existing state of the law. *See, e.g.*, *Traynor v. Turnage*, 485 U.S. 535, 546 (1988) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). And, in adding clause (iii), no member gave any hint that this change might eliminate the $1,000 cap on liability under clause (i).[19]

Surely "if Congress had such an intent, . . . at least some of the Members would have identified or mentioned it at some point," *Chisom v. Roemer*, 501 U.S. 380, 396 n.23

---

of an individual action relating to a consumer lease under . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000;

See Pub. L. No. 94-240 (1976).

[19] Indeed, the legislative history makes clear that what Congress actually sought to do was remove closed-end mortgages from the general scope of clause (i) in order to double the cap on these mortgages to $2,000. For example, the Committee report states "this amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling." H.R. REP. NO. 104-193, at 99. The floor statements in the Senate and House are even more explicit, stating that "the bill raises the statutory damages for individual actions from $1,000 to $2,000." 141 Cong. Rec. S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); *see also* 141 Cong. Rec. H9515 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum) (same).

(1991), for the resulting increase in statutory liability is substantial to say the least.[20] As *amici curiae* ABA, AFSA and CBA demonstrated in their brief in support of *certiorari*, on the most "ultra-conservative assumptions," the additional TILA liability on the auto industry alone would be $47.5 to $110 million for new car sales, and upwards of $180 million for used car sales. Brief of ABA, AFSA and CBA as *Amici Curiae* in Support of *Certiorari* 10-11. Of course, these figures represent only the tip of the iceberg because they do not account for the likely impact on, among other areas of consumer credit, credit-card debt, home-equity credit, and consumer loans for recreational vehicles and boats.

In all events, given the remarkable volume and dollar value of covered transactions, and the radical nature of the change that the Fourth Circuit found to have been implemented, it is truly incredible that the members of Congress would have spent time discussing the $1,000 increase in potential liability under clause (iii), but never even mentioned complete elimination of the cap on clause (i). "'In a case where the construction of legislative

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[20] *See, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 233-34 (1998) (stating that neither the language nor the legislative history of an amendment that made a certain subsection parallel to a later enacted subsection suggested that "Congress intended to change, or to clarify, the fundamental relationship between the two subsections"); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993) (rejecting asserted interpretation of amendment to statute because "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect" in the legislative history); *Clarke v. Sec. Indus. Assoc.*, 479 U.S. 388, 405-06 (1987) (rejecting asserted change in statutory meaning by changing certain words when there was "nothing in the legislative history . . . indicating that this change in the wording had substantive significance"); *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (concluding that "Congress intended nothing by the change in language" "[b]ecause the legislative history contains no indication that the variation in the language had changed the meaning" of the statute).

language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.'" *Chisom*, 501 U.S. at 396 n.23 (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)).

In this regard, it is equally incredible that not a single member of Congress referenced the elimination of the $100 floor on clause (i) liability. As Respondent points out in his opposition to *certiorari*, many TILA violations involve finance charges that, when doubled, are less than $100 (such as TILA violations involving credit card accounts). (Opp. 7-8) Thus, eliminating the $100 minimum might well discourage some consumers from acting as "private attorneys general"—enforcing both their own rights and deterring future violations—despite the undisputed fact that throughout TILA's history this has been a recognized purpose of the statutory damages provision.

To say the least, nothing in the legislative history remotely suggests a reason to depart from the uniform meaning of the word "subparagraph" or the longstanding authority that the statutory damages remedy of 15 U.S.C. § 1640(a)(2)(A)(i) is constrained by the $100-$1,000 limitation that now appears in 15 U.S.C. § 1640(a)(2)(A)(ii). *See* Elwin Griffith, *Searching for the Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 306 (2000) ("[The amended subparagraph (A) should be read] to preserve the original legislative meaning, while recognizing the subsequent legislative intent to craft more generous terms for certain secured transactions.").

III. THE FOURTH CIRCUIT'S READING OF TILA WOULD REDUCE THE AVAILABILITY OF CREDIT, HARM CONSUMERS, AND IMPEDE ECONOMIC GROWTH

The expansive and unprincipled construction of TILA's statutory-damage provision will increase the cost of credit to the detriment of credit consumers, particularly high-risk credit consumers, who are already on the margin.

The court of appeals' interpretation would raise the cost of credit generally because it would expose creditors to uncapped liability for even technical TILA violations. And as the *amici* have stated, this additional liability would lead to no appreciable reduction in technical TILA violations and would simply serve to increase lenders' costs. Brief of ABA, AFSA and CBA as *Amici Curiae* in Support of Petitioner at pt. II.; *see also* Peter Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 641 (1995). Worse, however, these increased costs would be substantially passed through to borrowers in the form of higher interest rates and related fees. R. Elizabeth Topoluk, *Predatory Lending: Minnesota and Illinois Developments*, 55 CONSUMER FIN. L.Q. REP. 86, 92 (2001) (imposing penalties on creditors for various "technical pitfalls" in lending practices will ultimately have the "inevitable results [of] higher costs to consumers, and reduced credit availability from traditional lenders").

Moreover, these passed-through costs would fall particularly hard on high-risk consumers—*i.e.*, those with few assets, little collateral, or poor credit histories. *Cf.* Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 180 (2002) (usury laws reduce high-risk debtor access to credit). These consumers already have substantial difficulty obtaining credit and the additional costs that would follow from the court of appeals' interpretation would only serve to further push these credit consumers out of the market. This is

doubly so because high-risk credit consumers typically pay the greatest finance charges, meaning that the passed-through costs of uncapped liability of twice the finance charge for this group would be particularly hard hitting.

Finally, the contraction of credit that may thus be anticipated will likewise detrimentally impact the economy as a whole. Without attempting to quantify this effect, it is safe to say that it will have an appreciable negative influence on economic growth.

CONCLUSION

The court of appeals' decision on the award under TILA should be vacated, and the case should be remanded.[21]

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April 19, 2004

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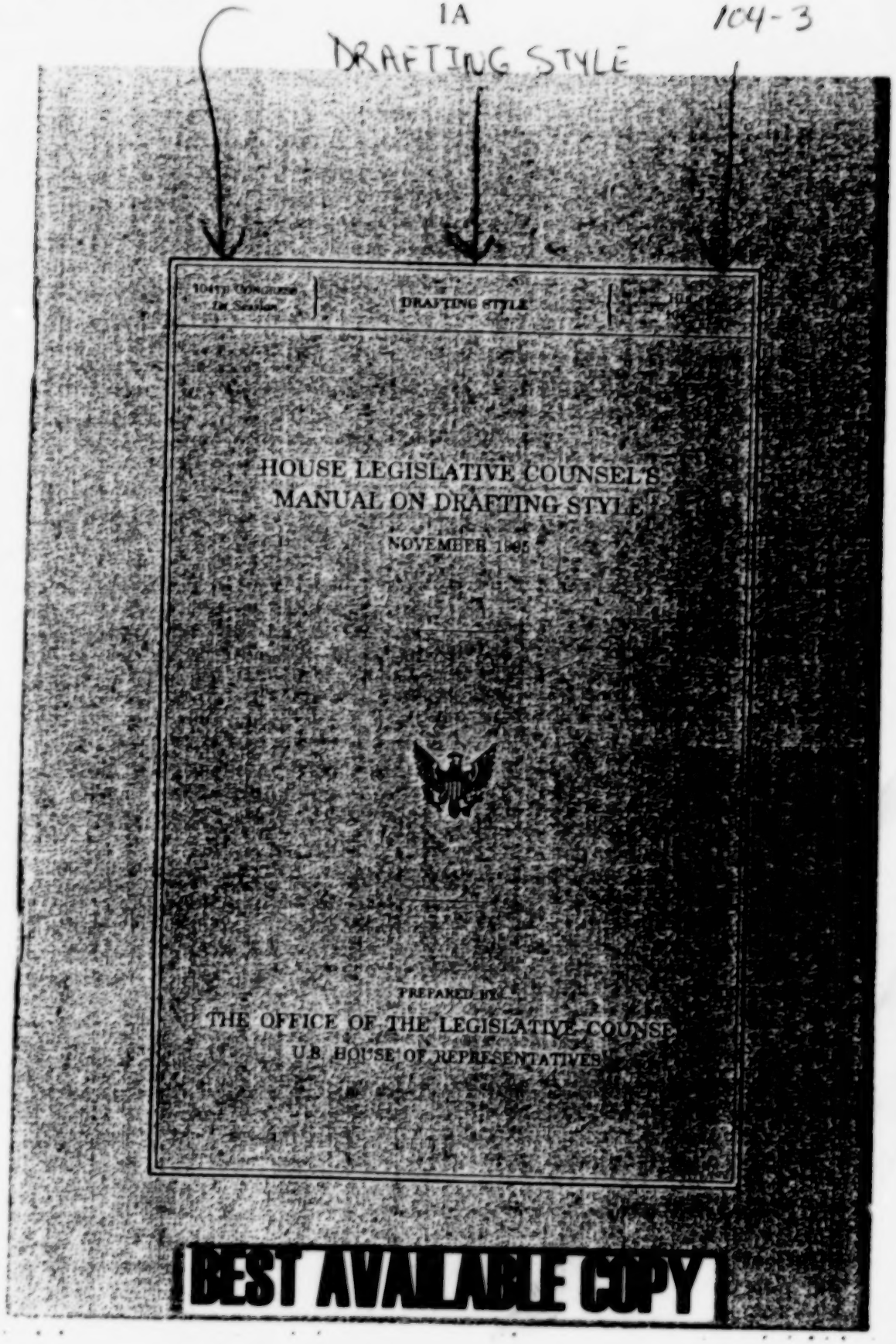
[21] In addition to correction of the damage award under TILA, the district court on remand must reconsider the $26,192.10 award of attorneys' fees in light of the amount of total recovery. (Pet. App. 53a) *See generally* 15 U.S.C. § 1640(a)(3).



written. It is not intended to be a complete compendium of drafting rules and conventions.

Subtitle B—Organization and Structure

SEC. 311. ORGANIZATION.

Before choosing an organization for a draft, determine to what extent it could appropriately fit into the following arrangement:

(1) GENERAL RULE.—State the main message.

(2) EXCEPTIONS.—Describe the persons or things to which the main message does not apply.

(3) SPECIAL RULES.—Describe the persons or things—

(A) to which the main message applies in a different way; or

(B) for which there is a different message.

(4) TRANSITIONAL RULES.—Describe the rules that are transitional and either are especially important or will have effect for a relatively long period of time.

(5) OTHER PROVISIONS.

(6) DEFINITIONS.—See section 326.

(7) EFFECTIVE DATE.—See section 329.

SEC. 312. STRUCTURE.

(a) SECTION BREAKDOWN AND FORMAT.—

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(1) IN GENERAL.—To the maximum extent practicable, a section should be broken into—

(A) subsections (starting with (a));

(B) paragraphs (starting with (1));

(C) subparagraphs (starting with (A));

(D) clauses (starting with (i)); and

(E) subclauses (starting with (I)).

(2) SECTION HEADINGS.—If section headings are used, then all sections in the bill should have them, including section 1.

(b) MULTIPLE SUBDIVISIONS.—If there is a subdivision of the text of a unit, there should not be a different kind of subdivision of that unit unless the latter is part of the 1st subdivision. Thus, the following is incorrect:

"(a) One often finds the need for subdivisions. Subdivisions may take the form of—

"(1) paragraphs; or

"(2) other divisions.

In complex legislation there often is the need for multiple subdivisions. Such subdivisions are often found in—

"(A) the Social Security Act . . . ".

The example should be restated as follows:

"(a)(1) One often finds the need for subdivisions. Subdivisions may take the form of—

"(A) paragraphs: or

"(B) other divisions.

"(2) In complex legislation there often is the need for multiple subdivisions. Such subdivisions are often found in—

"(A) the Social Security Act . . . ".

Subtitle C—Particular Legislative Provisions

SEC. 321. LONG TITLE.

(a) IN GENERAL.—A title should accurately and briefly describe what a bill does.

(b) AMENDATORY BILLS.— For bills amending primarily 1 law, use the form "To amend [citation of law] to . . . ".

(c) CONSTITUTIONAL AMENDMENTS.—For constitutional amendments, use the form "Proposing an amendment to the Constitution of the United States concerning . . . ".

(d) AND FOR OTHER PURPOSES.—If the bill covers multiple items, ", and for other purposes" may be used at the end of the title instead of describing each item.

(e) PRIVATE RELIEF.—For private relief, use the form "For the relief of . . . ".

(d) POPULAR NAMES.—In the case of a non-positive law Act without a short title but with a generally-known popular name, the popular name may be included in the parenthetical reference if it would aid the reader. Example: "section 343 of Public Law 91-353 (9 U.S.C. 343; commonly known as the Chappell-Bell Act)".

(e) REFERENCES WITHIN AN ACT OR SECTION.—Omit "of this Act", "of this section", or similar references unless another Act or provision is also made reference to, and clarity would be increased by including the phrase.

(f) REFERENCES TO COMPONENTS OF A SECTION.—

(1) REFERENCE BASED ON A PROVISION'S ALPHABETICAL OR NUMERICAL DESIGNATION.—For uniformity, refer to any separately indented provision on the basis of its class designation. For example, indented items within the class designated "(1), (2), (3) . . . " should be consistently referred to as paragraphs; and indented items within the class designated "(A), (B), (C) . . . " should be consistently referred to as subparagraphs. However, if "(1)" or "(A)" is not indented. then it is always referred to as a clause or subclause. But note that some old laws have different designations and it may be confusing not to follow those designations. For example,

the Federal Food, Drug, and Cosmetic Act consistently refers to ...its beginning "(a)", etc. as paragraphs.

(2) REFERENCE TO MORE THAN 1 UNIT.—If the reference is to more than 1 unit, the reference is to the senior unit. Thus, refer to section 5(a)(1) and not paragraph 5(a)(1).

(3) MULTIPLE BREAKDOWNS.—

(A) IN GENERAL.—For clarity and brevity's sake, "section 503(b)(2)(A)(i) of the XYZ Act" is preferred to "clause (i) of subparagraph (A) of paragraph (2) of subsection (b) of section 503 of the XYZ Act".

(B) EXCEPTIONS.—

(i) IN AMENDMENTS.—When amending section 503(b)(2)(A)(i), the amendment should be stated as an amendment to clause (i) of section 503(b)(2)(A).

(ii) LATER REFERENCE.—It may also be beneficial to cite to "clause (i) of section 503(B)(2)(A) of the XYZ Act" if a later reference is to be made back to "such clause".

(iii) JOINT REFERENCES.—Similarly, it is easier to understand a citation to 2 or

LEGISLATIVE DRAFTING MANUAL

OFFICE OF THE LEGISLATIVE COUNSEL

UNITED STATES SENATE

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SEC. 1201.

TITLE II—MAJOR LEGISLATIVE COMPONENT
SEC. 2001.
SEC. 2002.
SEC. 2003.

SEC. 112. ORGANIZATION OF A SECTION.

(a) IN GENERAL.—A section contains some or all of the following provisions and is organized as follows:

SEC. 101. SECTION HEADING.
(a) DEFINITIONS.—
(b) GENERAL RULE.—
(c) EXCEPTIONS.—
(d) SPECIAL RULES.—
(e) TRANSITION RULES.—
(f) EFFECTIVE DATE.—

(b) SECTION BREAKDOWN.—A section is subdivided and indented as follows:

(a) SUBSECTION.—
(1) PARAGRAPH.—
(A) SUBPARAGRAPH.—
(i) CLAUSE.—
(I) SUBCLAUSE.—
(aa) ITEM.—[To be avoided].
(AA) SUBITEM.—[To be avoided].

(c) SINGLE CONCEPT.—Each subdivision of a draft should express a single concept.

(d) CUT-INS FOLLOWED BY FLUSH LANGUAGE.—

(1) IN GENERAL.—Text in the following form is referred to as a cut-in followed by flush language (i.e., text printed flush to the margin):

(a) CRITERIA FOR AWARD.—If the Secretary finds that—
(1) the project will protect the environment in accordance with the requirements of this Act; and
(2) the applicant has the technical expertise necessary to carry out the project;
the Secretary shall award a grant to the applicant.

(2) AVOIDANCE.—Avoid using a cut-in followed by flush language, because doing so makes it difficult to amend the provision later.

(3) CORRECT FORM.—The example given in paragraph (1) should be redrafted as follows:

(a) CRITERIA FOR AWARD.—The Secretary shall award a grant to the applicant if the Secretary finds that—

(d) REFERENCES TO A PROVISION WITHIN A PROVISION.—

(1) REFERENCES TO 1 PROVISION WITHIN A PROVISION.—Refer to "section 123(a)(1)(A) of the ABC Act (YY U.S.C. ZZZ(a)(1)(A))" [*not* "subparagraph (A) of paragraph (1) of subsection (a) of section 123 of the ABC Act (YY U.S.C. ZZZ(a)(1)(A))"].

(2) REFERENCES TO MORE THAN 1 PROVISION WITHIN A PROVISION.—Refer to "subparagraphs (A) and (B) of section 123(a)(1) of the ABC Act (YY U.S.C. ZZZ(a)(1))" [*not* "section 123(a)(1) (A) and (B) of the ABC Act (YY U.S.C. ZZZ(a)(1) (A) and (B))"].

(e) ROGUE LAWS.—

(1) NO ALPHABETICAL OR NUMERICAL DESIGNATIONS.—In the case of a section that contains more than 1 undesignated indented provision, each provision is referred to as an "undesignated paragraph" (not a subsection), e.g. the fourth undesignated paragraph of section 123 of the ABC Act (YY U.S.C. ZZZ).

(2) DESIGNATED TEXT NOT INDENTED.—In the case of a provision that contains text that is designated but not indented, refer to each provision using the designation listed in section 112(b) that

Supreme Court, U.S.
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(13)

No. 03-377

IN THE
Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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June 8, 2004

QUESTION PRESENTED

The civil liability provision of the Truth in Lending Act provides, in relevant part, that any creditor who violates the Act "with respect to any person is liable to such person in an amount equal to the sum of—

> (1) [actual damages and]
> . . .(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[.]"

15 U.S.C. § 1640(a)(2)(A). The parties agree that the limitation on "liability under this subparagraph" does not apply to (A)(iii). The question presented is

Whether the term "this subparagraph," and thus the limitation on damages awards set forth in (A)(ii), applies just to (A)(ii) or to both (A)(i) and (ii).

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INTRODUCTION

This case presents a straightforward question of statutory interpretation. At issue is the meaning of a short phrase—"this subparagraph"—in the Truth In Lending Act ("TILA") that, in the context of the subdivision in which it appears, can refer to only one provision, section 1640(a)(2)(A)(ii). The legislative history is silent on the question. Construing the phrase according to its plain meaning does not lead to absurd results and is consistent with the statute's remedial purpose. Accordingly, the Fourth Circuit's holding that "this subparagraph" refers only to (ii) should be affirmed.

STATEMENT OF THE CASE

THE TRUTH IN LENDING ACT

Congress enacted TILA "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing practices," 15 U.S.C. § 1601(a), and "to assure a meaningful disclosure of the terms of leases." *Id.* § 1601(b); *see Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 377 (1972) (TILA "reflects a transition in Congressional policy from a philosophy of 'Let the buyer beware' to 'Let the seller disclose.'"). Because the statute is remedial in nature, its terms must be liberally construed to achieve Congress's purpose. *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir. 1993); *McGowan v. King*, 569 F.2d 845, 848 (5th Cir. 1978); *N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir. 1973); *Pechinski v. Astoria Fed. Sav. & Loan Ass'n*, 238 F. Supp. 2d 640, 642 (S.D.N.Y. 2003) ("The Courts of Appeals have consistently ruled that TILA should be liberally construed

in favor of the consumer in order to effectuate Congress' intent. . .").

Violations of the disclosure requirements may subject a creditor to civil and criminal liability. With respect to civil liability, Congress allowed consumers to recover both actual and statutory damages. 15 U.S.C. § 1640; *see infra* pp. 5-6 (text of current and former versions of statutory damages provision).

In the 1980 Truth in Lending Simplification and Reform Act, Congress overhauled TILA to "make creditor compliance easier" and "limit civil liability for statutory penalties to only significant violations," among other reasons. S. Rep. No. 96-368, at 16 (1979), 1980 U.S.C.C.A.N. 236, 251; *id.* at 267 (law restricts scope of civil liability "to only those disclosures which are of material importance in credit shopping"). The 1980 limits on the types of violations that give rise to liability for statutory damages remain in effect today.

FACTUAL BACKGROUND

In February 2000, respondent Bradley Nigh contracted to purchase a 1997 Chevrolet Blazer from petitioner Koons Buick ("Koons"). As part of the transaction, Mr. Nigh traded in his truck and made a $4,000 down payment. He got no credit against the purchase price for his trade-in because he estimated the remaining loan balance on his truck to equal the price that Koons gave him for it. Mr. Nigh signed a Buyer's Order, reflecting the purchase, and a retail installment sales contract, reflecting the financing. Mr. Nigh left his truck and drove home in the Blazer. Pet. App. 2a.

Koons later told Mr. Nigh that it was unable to find an assignee to purchase the assignment of the installment payments for the Blazer. Koons then restructured the deal to require an additional $2,000 down payment. Koons represented to Mr. Nigh that this change was a "better deal" at a lower interest rate and that he had to sign a new contract. Mr. Nigh returned to the dealership and told Koons that he did not have an additional $2,000. He asked Koons to allow him to return the Blazer, take back his truck, and walk away from the deal. Koons told him—falsely—that he could not withdraw from the deal because it had already sold his truck. Mr. Nigh, "unaware of this statement's falsity, and at a loss," signed a second contract and a $2,000 promissory note. *Id.* 3a.[1]

In the third line of the first contract, Koons had typed in only "N/A." In that line of the second contract, Koons typed in "SILENCER" and listed the price "965.00." 4th Cir. Jt. App. 45, 62.

About one week later, Koons again contacted Mr. Nigh to say that it was unable to sell the loan contract. Mr. Nigh alleged that Koons left a message that if he did not come to sign yet another contract, it would report the Blazer as stolen. Afraid of being arrested, Mr. Nigh returned to Koons and signed a third contract under protest. Pet. App. 3a.

Mr. Nigh stopped making payments on the note for his trade-in vehicle when he believed that it had become the property of Koons. He eventually learned that his truck had not been sold as Koons had told him, and had later been

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[1]For a discussion of such "yo-yo" sales practices, see *Rucker v. Sheehy Alexandria*, 228 F. Supp. 711, 718 (E.D. Va. 2002), and *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004).

repossessed by its note-holder from the Koons lot because of Koons's non-payment on the note. He also learned that one reason Koons could not find an assignee to assume the second contract was that it wrongfully included the $965 charge for the Silencer accessory that Mr. Nigh had neither requested, agreed to accept, nor received. *Id.* 3a-4a.

Even after the third contract was signed and the loan sold, Koons did not transfer title of the Blazer to Mr. Nigh. Approximately six weeks after signing the third contract, Mr. Nigh returned the Blazer to Koons with a letter asking for return of his down payment and trade-in. *Id.* 4a; 4th Cir. Jt. App. 772. Koons refused to return any money to Mr. Nigh and yet continued to withhold title to the Blazer.

PROCEEDINGS BELOW

Mr. Nigh sued Koons alleging claims under TILA, the Federal Odometer Act, the Virginia Consumer Protection Act ("VCPA"), and common law fraud. Koons filed a counterclaim for breach of contract and for fraudulent and negligent misrepresentation. The district court granted summary judgment to Koons on some claims, and other claims were tried to a jury. The jury found that Koons violated TILA "by intentionally including a charge" (the charge for the Silencer) on the sales contract "with knowledge that there was no basis for the charge," Pet. App. 9a, and that Koons violated the VCPA by falsely telling Mr. Nigh that it no longer had possession of his trade-in, so as to induce him to sign a new sales contract. *Id.* 4a. The jury awarded Mr. Nigh $24,192.80 (twice the amount of the finance charge in connection with the transaction) for the TILA violation and $4,000 for the VCPA violation. *Id.* 2a.

The parties appealed various aspects of the district court judgment to the Fourth Circuit. For present purposes, the only relevant issue is Koons's argument that TILA section 1640(a)(2)(A) capped the damages award at $1,000. Koons based its argument on *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983). There, the court of appeals was applying a prior version of TILA, which provided that damages would be equal to

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000[.]

15 U.S.C. § 1640(a) (1983) (emphasis added). In *Mars*, the court of appeals had held that the bold-faced language applied to both (i) and (ii), and therefore that damages awarded under either (i) or (ii) were limited to $1,000. 713 F.2d at 67.

Looking to the current version of section 1640(a)(2)(A), the Fourth Circuit rejected Koons's reliance on *Mars*. Since its amendment in September 1995, section 1640(a)(2)(A) provides that creditors who violate TILA may be liable for

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per

> centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 [.]

15 U.S.C. § 1640(a) (1995) (emphasis added). In an opinion by Judge Luttig, the court held that, although its prior assumption about the scope of "this subparagraph" was "plausible" in 1983, the 1995 amendment "rendered [that] interpretation defunct." Pet. App. 11a. The court held that, under the plain language of section 1640(a)(2)(A), "this subparagraph" refers only to (ii)—the subpart in which the words appear. Accordingly, the court of appeals upheld the jury's award of twice the finance charge. *Id.* 11a-13a.

Writing separately, Judge Gregory agreed that Koons "engaged in a variety of scurrilous business practices that support the jury's finding of liability under TILA." *Id.* 22a. He dissented, however, on the ground that the legislative history of the 1995 amendment did not manifest a specific intent to lift the statutory cap, and thus to abrogate *Mars*. *Id.* 17a.

SUMMARY OF ARGUMENT

The question in this case is to what does the term "this subparagraph" refer in TILA section 1640(a)(2)(A). Section 1640(a)(2)(A) has three subdivisions, enumerated (i), (ii), and (iii). Without doubt, (A)(iii) is not subject to the $1,000 cap on "liability under this subparagraph." Therefore, "this subpara-

graph" cannot sensibly refer to all of (A). Furthermore, (A)(i) and (A)(ii) taken together do not form a "subparagraph." Therefore, "this subparagraph" cannot refer to both (A)(i) and (A)(ii). "This subparagraph," and thus the $100 to $1,000 damages limitation, can refer only to the subpart in which it physically appears: (ii).

Despite the statutory text, Koons argues that the legislative history of the 1995 TILA amendments requires a different result. According to Koons, because Congress in 1995 did not state that it was lifting the limits on damages under (A)(i), it could not have intended to do so. The absence of legislative history, however, cannot override the statutory text. That text is susceptible of only one interpretation, as the Fourth Circuit held. And because that interpretation is not absurd, this Court must give it effect.

ARGUMENT

A. The Plain Text Of The Statute Requires Affirmance Of The Decision Below.

1. As Judge Luttig held, the plain language of section 1640(a)(2)(A) supports only one reading: The limits stated in subpart (ii) apply only to awards under subpart (ii). Again, the relevant provision states:

> **(2)(A)(i)** in the case of an individual action twice the amount of any finance charge in connection with the transaction, **(ii)** in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, **except that the**

> **liability under this subparagraph shall not be less than $100 nor greater than $1,000,** or **(iii)** in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[] (emphasis added).

The question here is whether "under this subparagraph" refers to (i) and (ii), or only to (ii). Because (iii) states its own maximum and minimum, "this subparagraph" cannot include (iii). *See* Pet. 22 n.14 (stating that "obviously" the phrase "cannot apply to subpart (iii)"). Accordingly, the "subparagraph" referred to in section 1604(a)(2)(A)(ii) cannot be (A) as a whole. Moreover, (i) and (ii) together do not constitute a discrete subparagraph. Accordingly, when (ii) says "this subparagraph," it can only be referring to itself. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

2. Recognizing that the existence of (iii) is a significant obstacle to its preferred statutory reading, Koons argues (at 29) that "this subparagraph" reasonably denotes all of (A), even though it does not include (A)(iii), because (A)(iii) is merely a "carve-out" of (A)(i). This theory is premised in part on the notion that subpart (iii) "does not include any measure of damages." Pet. Br. 29. But it does: "not less than $200 or greater than $2,000," as several courts have found. *See In re Mourer*, 287 B.R. 889, 897 (Bankr. W.D. Mich. 2003); *Williams v. BankOne*, 291 B.R. 636, 663 (Bankr. E.D. Pa. 2003); *Rodrigues v. United States Bank*, 278 B.R. 683, 689-90 (Bankr. D.R.I. 2002); *In re United Cos. Fin. Corp.*, 267 B.R. 524, 529 (Bankr. D. Del. 2000). Congress often defines the measure of damages in similar terms. *See, e.g.*, 15 U.S.C. § 1681n(1)(A) (violator of Fair Credit Reporting Act liable to consumer for actual damages *or* between $100 and $1,000); 15 U.S.C. § 1692k(a)(2)(A) (statutory damages not to exceed $1,000 under Fair Debt Collection Practices Act); 17 U.S.C. § 504(c) (statutory damages of between $500 and $20,000 for copyright infringement); 29 U.S.C. § 2104(a)(3) (civil penalty of up to $500 per day for violations of WARN Act). In fact, Congress similarly defined the measure of damages in TILA section 1640(a)(2)(B), which provides that, in a class action, damages will be in "such amount as the court may allow," but "shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor."

Subpart (iii) is a "carve-out" of (i) in the sense that it applies to a subset of the transactions that previously fell under (i). Nonetheless, the statutory language nowhere indicates that Congress was excepting subpart (iii) from any generally applicable provisions of (A). Instead, the language defines three categories of "individual actions," each of which is separately enumerated at the same level of the outline form and has its own method of calculating damages. If Congress's intent were as Koons describes it—to take transactions subject to (iii) out of the scope of provisions otherwise applicable to them—then the whole of (2)(A) would look very different from what the statute actually says. The statute described by Koons would look something like

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter,

> 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; Provided, however, that in the case of an individual action under subpart (i) relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000;

To be sure, Congress could have enacted such a statute. But it did not.

3. Koons argues (at 30) that the phrase "under this subparagraph" is superfluous under the Fourth Circuit's reading, and thus that "this subparagraph" must refer to two out of the three parts of (A). *But see Lamie v. United States Trustee*, 124 S. Ct. 1023, 1031 (2004) ("our preference for avoiding surplusage is not absolute."). However, as Judge Luttig pointed out, Pet. App. 12a-13a, without the phrase "under this subparagraph," the limitations might arguably be read to apply to both (i) and (ii). With the phrase, the statute makes clear that the limits apply only to "this" subparagraph. Again, the only discrete subpart to which "this" could possibly refer is (A)(ii).

Similarly, Koons argues (at 30) that the absence of the words "this subparagraph" in (iii) somehow demonstrates that inclusion of those words in (ii) makes them applicable to (i) as well. As just discussed, the term in (ii) makes clear that the limitation applies only to (ii), and not also to (i). Given the structure of (A), no clarification is necessary with respect to the limitation in (iii).

The word "subparagraph" also appears in section 1640(a)(2)(B). Because in subpart (B) "the term 'subparagraph' indisputably refers to all of (B)," Pet. Br. 23, Koons argues that in section 1640(a)(2)(A)(ii) the word must refer to all of (A). This theory misses the mark. First, as discussed above, Koons concedes (*e.g.*, at 20, 21) that the limitation on damages under "this subparagraph" does not apply to all of (A). Its contention is that it applies to two-thirds of (A)—a reading inconsistent with its own argument about (B).

Second, unlike (A), (B) has no subparts. Thus, each use of the word "subparagraph" refers to the "sub" in which the word appears: to (A)(ii) and to (B). Use of the term "subparagraph" in a single statutory section to refer to two different levels of the section's subdivisions is by no means unique to TILA. *See, e.g.*, 12 U.S.C. § 1823(c)(2)(A) (referring to both "subparagraph (B)" and "subparagraphs (i) through (iii)"); 42 U.S.C. § 7661a(b)(3)(B)(i) (referring to "subparagraphs (ii) through (v) of this subparagraph").

4. Koons spends several pages explaining that a statutory subparagraph is represented by an uppercase letter, not a lower case roman numeral. As described by Koons, statutes typically follow the following outline structure:

§ section
(a) subsection
(1) paragraph
(A) subparagraph
(i) clause
(I) subclause

Koons's heavy reliance on Congress's alleged rigid adherence to this structure is misplaced for several reasons.

First, even assuming that Koons is correct, the nomenclature described by Koons is fully consistent with the Fourth Circuit's and Mr. Nigh's reading. When Congress follows this format, and wants to refer to (i), for example, it may refer either to "subparagraph (A)(i)" or to "clause (i)." *See* House Legislative Counsel's Manual on Drafting Style, Nov. 1995, at 52 ("House Manual") (lodged with the Court by Petitioner).

In the provision at issue, Congress stated "this subparagraph" without further specification. As implicitly acknowledged by Koons (at 22 n.9), "this subparagraph" standing alone may refer either to "subparagraph (A)(ii)" or to "subparagraph (A)." However, in the context of (A) as a whole, only the former reading is possible. Again, "this subparagraph" cannot refer to all of (A) because, without dispute, (A)(iii) is not subject to the $1,000 cap on "liability under this subparagraph." Yet nothing in the sources cited by Koons suggests that "this subparagraph" can ever mean "clauses (i) and (ii) but not (iii) of subparagraph (A)." Accordingly, "this subparagraph" must refer to (A)(ii).

Second, the legislative drafting manuals on which Koons primarily relies are not authoritative statements of congressional practice. To the contrary, the House manual states that it is "not intended to be a treatise on legislative drafting, but rather a guidebook for individuals who are undergoing, or have undergone, on-the-job drafting training." House Manual at III. Moreover, the manual recognizes that a "variety of drafting styles exist today," and that the style described in the manual is "not the style most prevalently used in the past." *Id.* at 11. It further observes that "the diversity of

individuals drafting makes a consensus on a precise guide respecting structure and style an impossibility." *Id.* at 21.[2]

Consistent with the House manual's observation, the United States Code offers many examples of provisions in which Congress referred to a statutory subpart at the level of "(i)" as a "subparagraph." *E.g.*, 12 U.S.C. § 1823(c)(2)(A)(iv) ("subparagraphs (i) through (iii)"); 42 U.S.C. § 300ff-13(a)(3)(C) ("subparagraph (ii)"); 42 U.S.C. § 5105(A)(2) ("subparagraphs (i) through (ix)"); 42 U.S.C. § 7661a(b)(3)(B)(i) ("subparagraphs (ii) through (v) of this subparagraph"); 50 App. U.S.C. § 456(c)(2)(A) ("subparagraphs (ii) and (iii) of this clause"); 50 App. U.S.C. § 2016(a)(1)(A)(ii) ("subparagraph (i)").

Similarly, Congress does not consistently follow the manuals' guidelines with respect to the nomenclature of other statutory subparts. *E.g.*, 33 U.S.C. § 2024 (referring in (e) to "paragraph (g)" and in (f) to "paragraph (iii)"); 33 U.S.C. § 2025(b) (referring to "(a)" as paragraph, rather than subsection); 42 U.S.C. §§ 417(e)(1), (2) (twice referring to "(1)(B)" as "clause (B)"); 50 App. U.S.C. § 456(c)(2)(A) (referring to "A" as "clause"); *see also* S. Ct. R. 14(1)(i)(iv) (referring to Rule 14(1)(i)(i) as "sub-subparagraph (i)"). Nor does Congress consistently follow the order of characters—

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[2]Indeed, the House and Senate manuals conflict on several points. For example, the House manual suggests structuring bills in the following order: general rule, exceptions, special rules, transitional rules, other provisions, definitions, effective date. House Manual at 23. The Senate manual, however, offers the following order: definitions, general rule, exceptions, special rules, transition rules, effective date. Senate Legislative Drafting Manual, Feb. 1997, at 9 ("Sen. Manual") (lodged with the Court by Petitioner).

(a)(1)(A)(i)—described in the manuals. *See, e.g.*, 16 U.S.C. § 1280(a)(i); 22 U.S.C. § 2452(a)(1)(i)(A); 33 U.S.C. § 2024(a)(i); 33 U.S.C. § 2030(a)(i) (referred to in (a)(ii) as "subparagraph (i)"); 43 U.S.C. § 1595(a)(4)(i); 45 U.S.C. § 231c(f)(2)(i); 48 U.S.C. § 1574(b)(ii)(A).

Not surprisingly, the manuals are not cited in any reported case from this Court or any federal appellate court or district court.[3]

Third, the manuals are dated after the passage of the September 1995 TILA amendment at issue in this case. *See* House Manual at I (Nov. 1995); Sen. Manual at 1 (Feb. 1997). Accordingly, Congress did not have access to and could not have relied on these manuals when it drafted the TILA amendments. *Cf. Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("we have often observed that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (citation omitted); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote").[4]

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[3]The House manual has been cited three times in footnotes by Judge Chabot of the United States Tax Court. *Robinson v. C.I.R.*, 119 T.C. No. 4, 119 T.C. 44, 61 n.10 (2002); *Electronic Arts, Inc. v. C.I.R.*, 118 T.C. No. 13, 118 T.C. 226, 242 n.9 (2002); *Rochelle v. C.I.R.*, 116 T.C. No. 26, 116 T.C. 356, 367 n.2 (2001) (dissent).

[4]Amici American Bankers Association, *et al.* (at 14) make a similar argument based on a website, xml.house.gov, that did not exist in 1995. The website sets forth information about a programing language called eXtensible Markup Language, which the House did (continued...)

Finally, even if Koons were correct that "subparagraph" *must* mean (A), and not (A)(ii), the Court still should not adopt Koons's reading of the statute. Rather, if Koons is correct about the term's meaning, then Congress simply made a mistake. It neglected in 1995 to change "subparagraph" to "clause." To assume that Congress erred by using the word "subparagraph" would do far less damage to the language and structure of section 1640(a)(2)(A) than would Koons's reading. *See supra* pp. 9-10.

B. The Legislative Purpose And History Are Consistent With The Decision Below.

As this Court has stated, "[t]he starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes." *Lamie*, 124 S. Ct. at 1030 (citation omitted). And "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (citing cases). Nonetheless, unhappy with the statutory language, Koons argues that the legislative history, or rather the lack thereof, reveals Congress's true intent.

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[4](...continued)
not use for drafting until September 2002. *See* http://xml.house.gov/drafting.htm. Even now, the website cautions that the definitions are in "draft form" and that the House does not guarantee their quality or reliability. *See* http://xml.house.gov. In any event, amici overstate the import of the website's definitions when they write that, under the definition they quote, "this subparagraph" "could refer *only* to subparagraph (A)." Am. Bankers Br. 14 (emphasis added). In fact, the quoted definition states only that subparagraphs "are *normally* enumerated with an uppercase character within parentheses." *Id.* (emphasis added).

Koons argues that in 1995 Congress intended only to add a new cap on damages related to closed-end credit plans secured by real property, and not to lift the ceiling on damages related to other transactions. This argument is based, however, not on a statement in the legislative history, but on the absence of one. The legislative history does not say either way what Congress intended with respect to damages under (i). "Of course, where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992). Moreover, because the point at issue is "merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the [later] Congress forgot than for saying that the [later] Congress felt differently." *West Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991); *see also Brown v. Payday Check Advance, Inc.*, 202 F.3d 987, 991 (7th Cir. 2000) ("Section 1640(a) says that statutory damages are available 'only' for violations of enumerated subsections and rules. Section 1632(a) is not on that list. *Whether Congress should have included it, or would have done so had it thought more fully, does not affect interpretation of the law it actually enacted.*") (emphasis added). As the Fourth Circuit stated, "the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. . . . It is the law, and not any inferential intent, that constitutes the law." Pet. App. 13a.

Koons's argument on this point resembles the argument rejected by the Court in *Lamie*. There, the petitioner urged the Court to override the plain text of a provision of the bankruptcy statute because, he argued, Congress had made a drafting error and meant something different from what the statute said. Declining the petitioner's invitation to rewrite the law, this

Court noted its longstanding "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of the bill." *Lamie*, 124 S. Ct. at 1032 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)).

As in *Lamie*, the Court here is bound by the words of the law that Congress enacted. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we think . . . is the preferred result.'" *Id.* at 1034 (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994)) (ellipsis in original). Here, in light of the undisputed fact that the limitation on "liability under this subparagraph" does not refer to all of subpart (A), section 1640(a)(2)(A) affords only one reasonable reading: "This subparagraph" refers only to (A)(ii).

C. The Fourth Circuit's Reading Of The Plain Language Does Not Produce "Odd" Or Unconstitutional Results.

1. Under section 1640(a)(2)(A), Congress provided for damages for TILA violations of three sorts: Subpart (i) addresses "the case of an individual action;" subpart (ii) addresses "the case of an individual action relating to a consumer lease," and subpart (iii) addresses "the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling" (not including a residential mortgage). The parties agree that damages under (ii) are subject to a $100 floor and a $1,000 ceiling, and that damages under (iii) are subject to a $200 floor and a $2,000 ceiling.

Koons argues that, having limited damages under (ii) and (iii), Congress could not have intended that damages under

(i) have no limits. However, through other provisions, TILA does limit damages under (i). Pursuant to section 1603, TILA does not apply to loans in excess of $25,000, unless the loan is secured by real property or a dwelling. *See also* 12 C.F.R. § 226.3(b). Given this provision (and the fact that loans secured by real property fall under (iii)), damages under (A)(i) will not exceed about $30,000. In fact, damages will usually be much less, particularly in cases involving credit card transactions, where finance charges are relatively small. *See, e.g., Strange v. Monogram Credit Card Bank*, 129 F.3d 943 (7th Cir. 1997) ($27.36 finance charge); *Belmont v. Associates Nat'l Bank*, 119 F. Supp. 2d 149, 166 (E.D.N.Y. 2000) ($769.13 finance charge).[5]

For example, Mr. Nigh financed more than $19,000, and the finance charge was about $12,100. 4th Cir. Jt. App. 55. Because the amount financed was fairly close to the TILA maximum, and Mr. Nigh financed at a high interest rate (APR of 20.95%), *id.* this case shows that damages awards under (A)(i) will usually be less than the amount awarded in this case and will never be significantly more. Indeed, amicus Virginia

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[5]If a car buyer finances the maximum amount of $25,000 at the very high APR of 20.95 percent (the rate of Mr. Nigh's loan), over 60 months, the total finance charge will be $15,537.86. At the current average rate of 5.72% for a 60-month new car loan, the finance charge will be only $3,804.31. *See* www.bankrate.com/brm/rate/auto_home.asp?link=5, viewed June 1, 2004 (current rate); www.bankrate.com/brm/subhome/auto_A6.asp, viewed June 1, 2004 (for 60-month new car loan, average rate over past three months has ranged from approximately 5% to approximately 7.46%); *see also* www.bankrate.com/brm/static/rate-roundup.asp, viewed May 18, 2004 (for 36-month used car loan, "average used-car loan rate has increased in four of the past six weeks [as of May 13], and at 8.34 percent is the highest since August 27, 2003").

Automobile Dealers Association (at 6) posits that the average damages award associated with an auto loan will be about $9,000. Given inflation, a consumer would have to get $5,402.30 today to recover the value of the $1,000 award that Congress thought warranted in 1968. *See* http://stats.bls.gov/cpi/, visited June 1, 2004 (Dep't of Labor inflation calculator). The "extra" $3,618 the consumer may receive in the "average" TILA auto loan suit under the 1995 statute hardly demonstrates an irrational statutory scheme.

TILA's civil liability provisions are intended to provide an incentive to creditors to comply with the law and to consumers to enforce their rights. In 1995, 27 years after it enacted TILA, Congress may have felt that it was time to lift the $1,000 cap on damages related to loans such as auto loans because $1,000 in 1968 dollars was worth only $228.35 in 1995 dollars. *See* http://stats.bls.gov/cpi/.

On the other hand, in actions under (A)(iii) for improper disclosure of finance charges in connection with a mortgage or home equity loan, consumers may seek rescission, in addition to damages under section 1640(a)(2)(A)(iii). The right to rescission extends for three years and entitles the consumer to full reimbursement of all finance charges, interest, and other charges, including closing costs. 15 U.S.C. §§ 1635(b), 1635(f). This remedy, potentially worth tens of thousands of dollars, has no counterpart for individual actions brought in connection with auto loans or credit card transactions under (A)(i). *See In re Mourer*, 287 B.R. at 895 ("The repercussions of rescission in bankruptcy cannot be underestimated. A valid rescission would void the security interest and eliminate the Mourer[s'] obligation to pay finance or other charges."). It is hardly anomalous, therefore, that Congress would cap the additional recovery available under section 1640(a)(2)(A)(iii),

but would not cap the sole TILA recovery available in cases subject to section 1640(a)(2)(A)(i).

Furthermore. with respect to mortgages and other loans secured by real property, which are addressed in (A)(iii) and to which the $25,000 loan limit of section 1603 does not apply, uncapped damages of double the finance charge could result in awards of hundreds of thousands of dollars. If calculated based on the finance charge and then capped at $2,000, awards related to mortgages would almost always equal $2,000. Therefore, Congress made the reasonable decision to provide a range of damages for such transactions, rather than to provide for the calculation of damages by doubling an amount that would already exceed the upper limit of the range.

Koons (at 36) also suggests that if consumers are not guaranteed $100 for their trouble, they might be discouraged from bringing TILA suits. But surely the hope of $100 does not motivate any consumer (or consumer lawyer) to sue. And perhaps the fact that the $100 Congress wrote into the law in 1968 was worth only $22.83 in 1995 led Congress to recognize that the floor had so little value that it should be eliminated. In 1980, Congress made clear that it was maintaining the $100 floor to benefit consumers because, "without a fixed penalty, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer who relied on inaccurate disclosures to his detriment." 1980 U.S.C.C.A.N. 267. By 1995, this reasoning no longer applied because the value of $100 had declined so considerably.

The legislative history does not reveal why Congress removed the limits for credit transactions under (i) but not for consumer leasing transactions under (ii). Nonetheless, the decision to treat consumer remedies for the two types of

transactions differently is not surprising, as Congress has treated the two types of transactions differently in several respects. Consumer leases are addressed predominantly through the Consumer Leasing Act, 15 U.S.C. § 1667, which was enacted in 1976 as an amendment to TILA and incorporates TILA's remedy provision. *Id.* § 1667d. Under TILA, creditors may be held liable only for certain "significant" disclosure violations. 1980 U.S.C.C.A.N. 251; *see* 15 U.S.C. § 1640(a) (*see* text following (4)); *Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862, 866 (6th Cir. 2003); *Brown v. Payday Check Advance,* 202 F.3d at 991. On the other hand, under the Consumer Leasing Act, lessors may be held liable for *any* violation. 15 U.S.C. § 1667d. Accordingly, a cap on damages is more appropriate with respect to (A)(ii), under which lessors may be held liable for insignificant Consumer Leasing Act violations, than with respect to (A)(i), under which creditors may be held liable only for significant TILA violations.

In addition, individual actions under (i) are subject to a one-year statute of limitations, 15 U.S.C. § 1640(e), while individual actions under (ii) may be brought anytime up to one year after the termination of the lease. *Id.* § 1667d(c). This distinction does not explain Congress's decision to apply different damages caps, but it does illustrate that Congress does not think that consumer remedies for each of the two categories of transactions require the same legislative treatment.

2. Koons also suggests that reading the statute according to its plain language would largely eliminate the utility of class action litigation under TILA because section 1640(a)(2)(B) caps statutory damages in class actions at $500,000 or 1 percent of the net worth of the creditor, whichever is less. *But see Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("fact that Congress may not have foreseen all of

the consequences of a statutory enactment is not sufficient reason for refusing to give effect to its plain meaning"). Koons's argument is based on the idea that class actions are not viable if class members would get more in individual actions than they would get by participating in a class recovery. Yet the principal effect of section 1640(a)(2)(B) is to do just that, whenever the class is large. In practice, TILA class actions often result not just in a smaller recovery per class member than would be available in an individual action (under (i), (ii), or (iii)), but in a recovery that is small, in absolute terms, for each class member. *See, e.g., Postow v. OBA Federal Sav. & Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980) ($100 per class member); *Fetta v. Sears, Roebuck & Co.*, 77 F.R.D. 441 (D.R.I. 1977) ($5.38 per class member); *Eovaldi v. First Nat'l Bank of Chicago*, 71 F.R.D. 334 (N.D. Ill.1976) (95,000 members sharing in statutory damages of $100,000); *accord Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) ("Indeed, individual plaintiff recoveries in a [TILA] class action may be lower than those possible in individual suits because the recovery available under TILA's statutory cap on class recoveries is spread over the entire class."). On the other hand, where the number of class members is relatively small (fewer than 500), each member has always had, and still has, the possibility of recovering more than $1,000.

Thus, TILA class actions continue to be as viable as ever in situations where the recovery in an individual action would be small. Indeed, the Advisory Committee Notes to Federal Rule of Civil Procedure 23(b)(3) expressly identify cases in which "the amounts at stake for individuals may be so small that separate suits would be impracticable" as particularly well-suited to class treatment. *See* 39 F.R.D. 69, 104 (1966). Congress's 1995 amendment to TILA does not affect the efficiency or desirability of class treatment in such cases. And

even Koons would concede the utility of class actions in consumer lease, real estate, and home equity cases, which are subject to the damages limits of (ii) and (iii), and are not affected by the Fourth Circuit's plain language reading of (i). Finally, in many TILA cases, such as this one, class treatment would not be appropriate because of the fact-specific nature of the claim.

3. Petitioner's brief (at 32) and the amicus brief of the Michigan Bankers Association ("MBA") (at 8-9) suggest that the Fourth Circuit's decision raises due process concerns under this Court's analysis in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). This argument was not raised below and is, therefore, waived. *United States v. Bean*, 537 U.S. 71, 75 n.2 (2002); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

In any event, as Koons and its amici must acknowledge, the punitive damages guidelines discussed in *State Farm* are "not strictly applicable" here. MBA Br. 9. In many instances in which Congress has provided for statutory damages or penalties, the plaintiff's recovery will be many times the amount of actual damages. In such cases, application of a *State Farm* analysis makes little sense. For example, in any TILA case in which the $100 to $1,000 damages limit applies and actual damages are nominal, a statutory damages award of even $100 would be many times more than the ratio of compensatory to punitive damages that the Court disapproved in *State Farm*. Yet Congress clearly thought that actual damages alone would not adequately protect consumers from abusive, misleading, and fraudulent lending practices, and that a statutory award was warranted. Thus, Congress provided for awards of *both* actual damages (§ 1640(a)(1)) *and* statutory damages (§ 1640(a)(2)).

As this Court has stated, "legislative judgments concerning appropriate sanctions for the conduct at issue" are entitled to "substantial deference." *BMW of N. Am. v. Gore*, 517 U.S. 569, 583 (1996) (quoting *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). Accordingly, legislative judgments about appropriate statutory penalties guide this Court's review of punitive damages awards, not the other way around. *See, e.g., State Farm*, 538 U.S. at 425; *BMW v. Gore*, 517 U.S. at 583 & n.38, 584.

Moreover, the MBA's argument (at 9) rests on the premise that TILA violations are mostly inadvertent technical errors by well-meaning lenders. Yet in many cases, as in this one, the opposite will be true. *See, e.g., Singleton*, 595 S.E.2d 461 (discussing unlawful "yo-yo" sales). Equally important, Koons and its amicus neglect to mention that creditors are not liable for TILA violations that are "not intentional and resulted from a bona fide error," such as calculation errors. 15 U.S.C. § 1640(c). And a creditor can avoid TILA liability by correcting its error within 60 days of discovering it, 15 U.S.C. § 1640(b), or by showing good faith reliance on a Federal Reserve regulation or staff interpretation. *Id.* § 1640(f). In any event, there is certainly something perverse about creditors complaining that, under the decision below, they will suffer too much for their frequent statutory violations—particularly given that Congress has limited civil liability to "material" violations. 1980 U.S.C.C.A.N. 267; *see Brown v. Payday Check Advance*, 202 F.3d at 991 (Congress amended "TILA in 1980 to curtail damages awards for picky and inconsequential formal errors.").

In addition, even if the *State Farm* framework were applicable here, TILA's statutory damages would not run afoul of due process. As Judge Posner explained in *Mathias v. Accor*

Economy Lodging, Inc., 347 F.3d 672, 676-78 (7th Cir. 2003), *State Farm* does not establish a mathematical formula for evaluating punitive (or in this case statutory) damages awards. Courts must also consider whether any available award would otherwise "be too slight to give the victim an incentive to sue," and whether it "would enable the defendant to commit the offensive act with [relative] impunity provided that he was willing to pay." *Id.* at 677. Both of those concerns support the constitutionality of the plain language that Congress enacted. As Judge Luttig held, that language is susceptible of only one reasonable interpretation: The limitation on damages available under "this subparagraph" applies only to actions described in subpart (ii), and not to those, like Mr. Nigh's, described in (i).

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit

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REPLY BRIEF FOR PETITIONER

The parties agree that the issue before the Court turns on the meaning of the phrase "liability under this subparagraph" as it appears in 15 U.S.C. § 1640(a)(2)(A). (Resp. Br. at 1.) That phrase defines the applicability of the $100-$1,000 limitation on recoverable statutory damages under the Truth in Lending Act (TILA). In its opening brief, petitioner offered the following reasons, among others, for concluding that the word "subparagraph" refers to the division of Section 1640(a)(2) denominated by the letter "(A)," and not just to the division within it denominated "(ii)," and that the $100-$1,000 liability limitation thus extends to both (A)(i) and (A)(ii):

- The word "subparagraph" has a well-established meaning and usage throughout the TILA and throughout federal legislation in general, as referring to "a third level subdivision introduced with a capital letter." (Br. at 20-25.)
- This consistent usage and meaning of the term in federal statutes is entirely purposeful, as demonstrated by the current legislative drafting manuals of the House and Senate, and by numerous books on legislative drafting dating back many decades. (Br. at 25-28.)
- The statutory evolution of the provision in question shows that the word "subparagraph" was deliberately used in a manner consistent with this common usage. When the statute was amended in 1974 to move the liability provision from Section 1640(a)(1) to Section 1640(a)(2)(A), the relevant language was changed from "under this paragraph" to "under this subparagraph," thus indicating a correct understanding of the meanings of those words. (Br. at 33.)
- When the word "subparagraph" is read in the manner of the court below, as a generic reference whose application is wholly defined by its context, and is not given its usual specific meaning as a reference to the statutory division that begins with a capital letter of the alphabet, the phrase

"under this subparagraph" is rendered superfluous. If the phrase, so read, were omitted, it is entirely clear that the $100-$1,000 limitation would only apply to clause (ii). (Br. at 30.)

A. Respondent Has Not Refuted The Well-Established Meaning Of "Subparagraph"

Respondent does not materially dispute the correctness of any of these assertions, and thus fails to raise a serious question about the well-established meaning of the word "subparagraph."

Critically, respondent offers no usage of the word "subparagraph" within TILA referring to anything other than a third level subdivision introduced by a capital letter. He nonetheless claims that there is confusion about the actual meaning of the word, and notes the well-established practice, referred to in petitioner's opening brief (at 22, n.9), of using the name of the senior organizational unit in a cite referring to multiple legislative subdivisions—thus "subparagraph (A)(i)," not "clause (A)(i)." (*See* Resp. Br. at 12.)

Contrary to respondent's assertion, this convention, which, for example, causes one to refer to "Section 1640(a)(2)(A)(ii)," does not remotely suggest that the senior unit name is also a proper description of each of the hierarchical subparts included in the reference, when those subparts are each viewed in isolation.[1] Thus the preceding citation encompasses within it references to subsection (a), paragraph (2), subparagraph (A), and clause (ii), and none of

[1] Indeed, both the House Manual and the Senate Manual on legislative drafting explain that, "[i]f the reference is to more than 1 unit, the reference is to the senior unit. Thus, refer to section 5(a)(1) and not paragraph 5(a)(1)." U.S. House of Representatives Office of the Legislative Counsel, *U.S. House Legislative Counsel's Manual on Drafting Style* § 341(f)(2), at 52 (2d ed. 1995); *see also* U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* § 129(d)(1), at 43 (1997).

those subparts by itself is properly referred to as a "section." To conclude otherwise is to suppose that the hierarchy of terminology consistently used in federal legislation is simply meaningless.

Respondent also cites a total of six instances from the United States Code where the word "subparagraph" is misused to refer to a clause (Resp. Br. at 11, 13), three where the word "paragraph" is misused (*id.* at 13), and two where the word "clause" is misused (*id.*). This handful of such errors among the many thousands of usages throughout the whole of the United States Code hardly contradicts the overwhelming evidence that the word "subparagraph" has a clear and unambiguous meaning. For example, Westlaw research queries for the terms "subparagraph (A)" and "subparagraph (i)" in the United States Code database confirm the term's well-settled meaning: the phrase "subparagraph (A)" appears 3,978 times in the Code, while the phrase "subparagraph (i)" appears twelve times.

Respondent then suggests that the two official and five unofficial legislative drafting manuals and handbooks that uniformly adopt the usage of "subparagraph" as explained by petitioner should not be relied upon. (Resp. Br. at 12-14; *see* Br. at 25-28 & n.15.) But the fact that these manuals and handbooks may not have been cited by this Court previously (Resp. Br. at 14), or that there are a few minor, and irrelevant, discrepancies between these manuals (*id.* at 12-13 & n.2), does not in the least undermine the central significance of these authorities in showing the virtually uniform usage and understanding of the word "subparagraph" as referring to a third level legislative subdivision introduced by a capital letter. Indeed, in this respect, the cited authorities—which

collectively span the past half century—are entirely consistent.[2]

Respondent, and the court below (Pet. App. at 12a-13a) also deny that their reading of the phrase "under this subparagraph" renders it superfluous, *i.e.*, that the meaning of the statute would be unchanged if those words were omitted. (Resp. Br. at 10.) Indeed, respondent and the court below express the remarkable view that without these words, "the limitations might arguably be read to apply to both (i) and (ii)." (Resp. Br. at 10; Pet. App. at 12a.)[3] But, in fact, had the words "under this subparagraph" been stricken in 1995—given Congress's long-established and careful usage of the term "subparagraph"—then it would have been quite clear that Congress in fact took into consideration the pre-existing liability limitation under clauses (i) and (ii), and that Congress in fact wanted the $1,000 limitation to apply only to the clause in which it was physically located—*i.e.*, clause (ii). Since Congress did not strike "under this subparagraph," and since this language had always been understood to apply to both

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[2] *See* U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* § 129(d)(1), at 43 (1997); U.S. House of Representatives Office of the Legislative Counsel, *U.S. House Legislative Counsel's Manual on Drafting Style* § 341(f)(2), at 52 (1995); Lawrence E. Filson, *The Legislative Drafter's Desk Reference* 222 (1992); Donald Hirsch, *Drafting Federal Law* § 3.8, at 27 (2d ed. 1989); Maxwell J. Mehlman & Edward G. Grossman, *Yale Legislative Services Handbook of Legislative Drafting* 100 (1977); Reed Dickerson, *Legislative Drafting* 73-74 (1977 (originally published in 1954)); James Craig Peacock, *Notes on Legislative Drafting* 12 (1961). *See also* United States Congress Data Dictionary of Legislative Documents, available at http://xml.house.gov/subparagraph.html (last visited June 29, 2004).

[3] Respondent repeats the lower court's assertion that the words "under this subparagraph" simply "makes clear that the limits apply only to 'this' subparagraph"—*i.e.* clause (ii). (Resp. Br. at 10; *see* Pet. App. at 12a-13a ("[T]he inclusion of the 'under this subparagraph' clause not only enables, but actually compels, the reading we give the statute . . . .").)

clauses (i) and (ii), and since the legislative record is absolutely devoid of any indication whatsoever that Congress otherwise sought to eliminate the $1,000 limitation vis-a-vis clause (i), there is simply no basis to suppose that the 1995 Congress meant to make any such change.

B. Respondent Has Not Shown Any Basis To Believe That The 1995 Amendment Requires That The Well-Established Meaning Of "Subparagraph" No Longer Controls

Notwithstanding respondent's failure to seriously dispute that "this subparagraph" has an ordinary and well-established meaning, as reflected throughout TILA, the United States Code, and the legislative drafting manuals, respondent nonetheless insists that his contrary construction of "the plain language of Section 1640(a)(2)(A)" is the only one to which the words are susceptible. (Resp. Br. at 7; *see* Pet. App. 13a (characterizing the court's reading of the statute as "compel[led]").)

Respondent offers only one argument in support of his construction. Echoing almost verbatim the principal reasoning of the court of appeals, respondent insists that the separate maximum and minimum damage amounts set out in clause (iii) of Section 1640(a)(2)(A), which was added in 1995, necessarily means that the phrase "this subparagraph" cannot refer to all of subparagraph (A), and thus that it must refer only to clause (ii). (Resp. Br. at 8 (reiterating court of appeals' argument (Pet. App. 11a)).)

Respondent, like the court below, here seeks to deduce the meaning of the word "subparagraph" from its usage in a single sentence. While one can imagine trying to reason in that way if one were denied access to information on the common meanings of words and their usage in contexts similar to the one at issue, there is certainly no reason to do so here. Most obviously, where a particular word has a consistent, precise

and unambiguous meaning, there is simply no occasion to deduce its meaning solely from the narrow provision in which it is used. In this case, "subparagraph" is a widely used term of art in the world of federal legislative drafting, whose very specific meaning is honored with uniformity throughout TILA and with virtual uniformity throughout the United States Code as a whole. No less than if "subparagraph" were defined in a glossary to the statute, the term has a plain meaning that is conclusive of the issue in question. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (if the text "is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress") (citation omitted).

If there is no occasion here to deduce the meaning of "subparagraph" from just the narrow provision of Section 1640(a)(2)(A), since its meaning is already well-established, there is likewise no reason to flee from the established definition that exists, or to conclude, as does respondent, that if petitioner is "correct about the term's meaning, then Congress simply made a mistake."[4] (Resp. Br. at 15.) As respondent acknowledges, "[s]ubpart (iii) is a 'carve-out' of (i) in the sense that it applies to a subset of the transactions that previously fell under (i)." (Resp. Br. at 9.) And as is apparent from both the specific language and the legislative history of clause (iii), Congress's intention was to impose a higher range of penalties—$200-$2,000—for claims relating to closed-end

[4] This invitation to simply re-write Congress' words if they do not square with respondent's beliefs about the statute's meaning cannot be squared with respondent's principal argument that, "[a]s in *Lamie* [*v. United States Tr.*, 124 S. Ct. 1023 (2004)], the Court here is bound by the words of the law that Congress enacted. 'If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we think . . . is the preferred result."' *Id.* at 1034 (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994)) (ellipsis in original)." (Resp. Br. at 17.)

real estate transactions which otherwise would have been governed by the $100-$1,000 limitation applicable to (i). The notion of a general rule subject to specific exceptions is well-known in the law. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). The fact that a specific exception (*e.g.*, the $2,000 cap for closed-end mortgages) to a general rule (*e.g.*, the $1,000 cap for consumer financing agreements) is expressly provided for does not support an inference that the general rule has been repealed or altered, except with regard to the express exception itself. Under all the circumstances, therefore, it is entirely clear that clause (iii) and its $2,000 limitation is just such an exception here, and that the pre-existing provision was otherwise left unchanged.

If there were any conceivable doubt about this point, it would be appropriate to look beyond the specific words of the provision at issue and consider the overall functioning of the statute, its historical evolution, and its legislative history. From its inception in 1968 until the addition of clause (iii) in 1995, TILA's statutory damages provision has been capped at $1,000, and nowhere in the legislative record is there any hint of an intention to change that. Indeed, the legislative history of the 1995 enactment indicates that Congress' *only* intention was to double the damages cap on closed-end mortgages to $2,000.

Moreover, it is not, as respondent asserts (Resp. Br. at 16) that the legislative history simply omits any reference to a purpose to lift the liability cap on clause (i). Affirmative statements in the legislative record are flatly inconsistent with any such purpose. When the amendment was explained in the House Report (and by Senator Mack and Representative McCollum on the floor) as "increas[ing] the statutory damages available" in connection with mortgage loans due to special considerations pertaining to such loans, H.R. Rep. No. 104-

193, at 99, 1995 WL 432335, at *99; (*see* Br. at 7), those statements took as their premise the continued applicability of the existing $1,000 cap with regard to other consumer loan transactions, since otherwise mortgage loans would have a cap lower than all other loan transactions. Of course it would also be strange in the extreme for legislation openly aimed at modestly increasing the cap pertaining to mortgage loans to have the effect, *sub silentio*, of entirely eliminating the cap on a much larger category of loans, with far more dramatic consequences.

Finally, the last eight pages of respondent's brief, and virtually all of the argument in the brief of *amicus curiae* National Association of Consumer Advocates, *et al.*, are devoted to various assertions that eliminating the $1,000 cap on liability under clause (i) would be both rationally defensible and constitutional.[5] Since the evidence is overwhelming that Congress has in fact not taken that action, there is no occasion to address those policy arguments at any length. Indeed, respondent and the *amici* offer no suggestion whatsoever that Congress has ever—before, during, or even after passage of the 1995 amendments—considered the policy arguments they

[5] *Amici* National Association of Consumer Advocates, *et al.*, argue that elimination of the liability cap on clause (i) could have been justified by a need to deter certain fraudulent lending practices, including "spot delivery" or "yo-yo sales," where "the dealer first lets the consumer leave the lot 'on the spot' with the car, and then pulls on the string to bring the consumer back to sign a new, more expensive credit contract." (Brief of NACA, *et al.* as Amicus Curiae in Support of Respondent at 8.) *Amici* further allege that the transaction at issue was just such a "yo-yo sale," in which respondent was twice called back to the dealer to sign amended credit contracts, with the implication that the later contracts were increasingly unfavorable to respondent. While this is not the place to re-litigate the facts underlying this case, this assertion is contradicted by the fact that both the interest rate and the total sales price in the transaction were lower in the third RISC than in the first. (*Compare* J.A. at 47 (RISC I), *with id.* at 59(RISC III).)

raise. It is worth noting, however, that respondent has offered misleading explanations for why Congress might lift the liability cap on non-mortgage loans while leaving it in place for lease transactions.[6]

More generally, apart from the question of constitutionality, any claim that a statute has been silently amended to increase by many multiples the potential recoveries for unintentional

[6] Respondent suggests that there are two distinctions between liability under clauses (i) and (ii), that might explain why Congress could have thought it appropriate to eliminate the cap on (i) but not on (ii).

First, respondent justifies eliminating the $1,000 cap on liability under clause (i) because lending transactions under clause (i) are only covered under TILA up to $25,000. (Resp. Br. at 18.) But this offers no basis for treating loan transactions under clause (i) differently from consumer leasing agreements under clause (ii) since such agreements are covered only if the total leasing arrangement is valued at $25,000 or less. *See* 15 U.S.C. § 1667.

Second, respondent's assertion that statutory damages are only recoverable for "significant disclosure violations" relating to lending transactions, but are recoverable "for any" violation relating to leasing transactions, is equally misleading. (Resp. Br. at 21.) Absent proof of actual damages resulting from a leasing transaction, statutory damages are only recoverable under clause (ii) for violations enumerated in 15 U.S.C. §§ 1667a and 1667b, which, upon review, are obviously not of a hyper-technical nature like those in TILA that Congress removed from statutory damages liability under clause (i) in 1980. Indeed, Sections 1667a and 1667b set out only approximately 14 violations of the Consumer Leasing Act that allow a statutory damage recovery under clause (ii). 15 U.S.C. § 1667d. By contrast, even after the 1980 changes, there are over two dozen TILA violations for which statutory damages are available under clause (i).

Moreover, a simple comparison of the Consumer Leasing Act provisions covered by clause (ii) and the TILA provisions covered by clause (i) reveals a striking similarity in the material nature of the violations. For example, the TILA violations covered under clause (i) generally control disclosure of the finance charge, related fees, and payment periods; by comparison, Section 1667a and 1667b of the Consumer Leasing Act require similar disclosures for the lease payments, related fees, and payment periods.

violations that cause no actual injury must be viewed with a healthy dose of skepticism. Given the radical nature of the legislative change asserted by respondent and the court of appeals, the notion that such a change would have been unanimously adopted by both the House and Senate in 1995 without so much as a single legislator anywhere making reference to it in the legislative record is implausible in the extreme. *See generally Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342-43 (1999) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception."); *Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987) ("All in all, we think that this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.").

CONCLUSION

For these reasons, and for the reasons stated in petitioner's opening brief, the decision below should be vacated and remanded.

Respectfully submitted,

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In the Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND THE CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The issue in this case is whether Congress intended to eliminate the $100/$1000 statutory civil liability limitation, contained in subparagraph (A) of 15 U.S.C. § 1640(a)(2), on statutory penalties for non-mortgage, non-lease violations of the Truth in Lending Act (TILA). *Amici curiae* have been present and involved throughout the initial enactment of and subsequent amendments to TILA. *Amici* also represent thousands of financial institutions – which, as consumer lenders, risk being subjected to civil penalties that are an order of magnitude greater than the maximum that Congress intended or enacted, for technical violations of TILA and its interpreting regulations. For these reasons, *amici* are well situated to brief the Court on the proper interpretation of Section 1640(a)(2)(A).

Amicus curiae American Bankers Association (ABA) is the largest national trade association of banks in the United States. The ABA represents approximately 90 percent of the domestic assets of United States banks, with members located in all fifty States and in the District of Columbia. ABA members include banks of all types and sizes – including money-center banks, regional banks, and community banks. The ABA frequently appears in litigation as *amicus curiae* in cases raising issues of widespread importance to banks or consumers of banking services.

Amicus curiae American Financial Services Association (AFSA) is the national trade association for finance companies and other consumer lenders that raise funds in the capital markets. Founded in 1916, AFSA has approximately 360

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

member companies operating more than 10,000 offices throughout the United States, all engaged in the extension of consumer credit. On behalf of its members, AFSA monitors legislative, regulatory, and judicial actions affecting the market-funded finance industry, and participates as *amicus curiae* in litigation to ensure that the courts are apprised of relevant and accurate industry information.

Amicus curiae Consumer Bankers Association (CBA) was founded in 1919 and has as members most of the Nation's largest bank holding companies, as well as regional and super community banks, that collectively hold two-thirds of the banking industry's total assets (in excess of $2.9 trillion). Its member institutions are the leaders in consumer financial services, including auto finance, home-equity lending, credit cards, education loans, small business services, community development, investments, deposits, and delivery. Through its Government Relations Department, CBA advocates on behalf of its membership on issues before the regulatory agencies, the Legislative Branch, and the courts, including issues relating to TILA.

Amici have a strong interest in reversal of the decision below because of the harmful impact that the Fourth Circuit's rule would have on the consumer credit industry. A holding that the $100/$1000 statutory civil liability provision applies (as it always has) to all of subparagraph (A) of Section 1640(a)(2), with the exception since 1995 of an explicitly carved-out clause (iii) for a subset of consumer loans, will right Congress's carefully crafted balance, both protecting consumers from inappropriate lending practices and permitting responsible lenders to conduct their business without fear of excessive liability for technical violations.

STATEMENT

This case requires the Court to interpret 15 U.S.C. § 1640(a)(2)(A), which establishes minimum and maximum statutory civil liability for individual borrowers claiming harm from a violation of TILA or its implementing Regulation Z, 12

C.F.R. Part 226. Section 1640, TILA's civil liability provision, has nine subsections, (a)-(i). Subsection (a), which states allowable damages, has four paragraphs, (1)-(4), which provide for, among other things, actual damages and attorneys' fees. Paragraph (2) of subsection (a), which provides for civil penalties that are added to any actual damages and allowable attorneys' fees, has two subparagraphs, (A) for individual actions and (B) for class actions. Subparagraph (A) has three clauses, (i)-(iii), and specifies the following civil penalties:

> (A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000.

The subparagraph contains two minimum/maximum statutory liability provisions – $100/$1000 for most loans and leases under subparagraph (A) – or, according to the courts below, for only a small portion of the subparagraph – and $200/$2000 for the subset of consumer loans carved out for special treatment in clause (iii).

There is no dispute that, when TILA was enacted in 1968, the $100/$1000 statutory liability provision, stated by the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000," was included in substantially identical form and applied only to consumer loans that are contained in clause (i). And there is no serious dispute that even after Congress in 1976 added clause (ii) with a provision for consumer leases, but before the 1995 amendments to TILA, liability for run-of-the-mill consumer loan transactions under clause (i) – including loans for automobiles, credit card

borrowing, and home-equity lines of credit – remained subject to the $100/$1000 provision. But the courts below held that, when Congress amended TILA in 1995 to add clause (iii) – intending only to increase the civil liability for violating TILA in the case of the subset of consumer loans that it placed in clause (iii) – it also narrowed the application of the $100/$1000 provision to clause (ii) only.

A. The Truth in Lending Act

Congress enacted in 1968 a system of mandatory disclosures by consumer lenders in order to overcome the asymmetry of information in consumer lending transactions. See Pub. L. No. 90-321, 82 Stat. 146 (1968). The Federal Reserve Board was given interpretive authority (15 U.S.C. § 1604), and has promulgated Regulation Z, contained in the Code of Federal Regulations at 12 C.F.R. Part 226. Under TILA and Regulation Z, lenders are required to make highly specific factual disclosures to borrowers "before the credit is extended" (15 U.S.C. § 1638(b)(1)). See 15 U.S.C. §§ 1637, 1637a, 1638; 12 C.F.R. Part 226.[2] Regulations govern, among other things, the relative size of type on disclosures that are required to be made in written form; specific verbiage required to be used in the disclosures; the type of information that may be provided together with the disclosures; whether certain disclosures must be written, or may be given orally; at what point in the transaction the disclosures must be made; when (and whether) disclosures must be updated; and whether written disclosures must be given to the borrower to keep, or merely to view. See 12 C.F.R. §§ 226.5a, 226.5b, 226.17.

[2] The Board's interpretative authority does not extend to the civil liability provisions of Section 1640, so Regulation Z is related to the issue before this Court only insofar as it shows the extensiveness and complexity of the regulatory scheme and the high potential for technical violations that cause no actual damages and thus will make paragraph (2) of Section 1640(a) the operative damages provision. One sub-issue before the courts below was whether petitioner could be liable at all for a TILA violation when the errors were made in an early version of the auto-loan contract that never became binding on respondent, and the Board has defined "consummation" – the point at which TILA liability attaches – to be the "time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2. As one court noted, holding the transaction to have been "consummated" when no formal agreement was reached does violence to the interpretation of consummation promulgated by the Board. See *Bragg* v. *Bill Heard Chevrolet, Inc.*, 245 F. Supp. 2d 1235, 1238 (M.D. Fla. 2003) (discussing the decision below).

Congress established criminal, administrative, and private civil enforcement schemes for TILA. RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 13.01, at 885 (Robert A. Cook *et al.*, eds., 2000). Congress intended that administrative enforcement be the primary mechanism to ensure compliance with TILA disclosure requirements. See H.R. REP. NO. 90-1040, 90th Cong., 1st Sess. (1967), reprinted in 1968 U.S.C.C.A.N. 1962, 1976. Thus, the Federal Reserve Board and other agencies were given enforcement authority over different classes of TILA creditors. See 15 U.S.C. § 1607. Criminal penalties for a "willful[] and knowing[]" TILA violation include fines up to $5000 and up to one year of imprisonment. *Id.* § 1611. And in Section 1640, as amended in 1974, 1976, 1980, and 1995, Congress permitted a successful TILA plaintiff to recover the actual damages (if any) suffered because of the violation; in addition to one of (1) twice the amount of the finance charge, with a minimum of $100 and a maximum of $1000 for garden-variety consumer loan and lease transactions; (2) minimum $200, maximum $2000 for a subset of consumer loans that gathered special congressional concern in 1995; or (3) $500,000 or 1 percent of the creditor's net worth, with no per-borrower minimum, for class actions. The only issue in this case is whether garden-variety loan transactions were excepted from the $100/$1000 provision by the 1995 amendment to TILA.

Until the decision below, one federal court of appeals had addressed the $100/$1000 provision. The Seventh Circuit held that the meaning of clauses (i) and (ii) (which it termed "subparts") remained untouched by the addition of clause (iii). See *Strange* v. *Monogram Credit Card Bank*, 129 F.3d 943, 947

(7th Cir. 1997). In *Strange*, it was the statutory minimum liability that was at issue; twice the finance charge in that case came to $54.72. *Id.* at 945. Because "the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A)" (129 F.3d at 947), "the 'subparagraph' mentioned in § 1640(a)(2)(A)(ii) continues to encompass what is now codified as subparts (A)(i) and (A)(ii), not just subpart (A)(ii)" (129 F.3d at 947).

B. The Facts and Proceedings in this Case

Respondent Bradley Nigh sought to buy a Chevrolet Blazer from petitioner Koons Buick Pontiac GMC, Inc. He entered into a "spot sale" transaction: in exchange for a $4000 down payment, a trade-in, and an agreement to enter into a loan transaction if petitioner could find a lender, respondent got to take the Blazer home immediately. In such a transaction, the ultimate loan agreement is between the buyer and a consumer lender other than the seller – but, though it is not in fact the lender, the seller nevertheless is the statutory "creditor" under TILA. 15 U.S.C. § 1602. Initially, petitioner could not find financing for respondent at the quoted rate; later, errors were discovered in the paperwork; and respondent never actually became contractually obliged to pay on a loan until the third attempt to reach an agreement. Pet. App. 3a-4a. Respondent ultimately sued petitioner in federal court, alleging violations of TILA and Regulation Z (as well as state-law claims) and seeking statutory damages and attorneys' fees.

Judge Gerald Lee of the Eastern District of Virginia awarded summary judgment to Koons Buick on its breach-of-contract counterclaims against respondent Nigh and on several of Nigh's claims. The suit was tried to a jury on the TILA claim and a Virginia Consumer Protection Act (VCPA) claim. Pet. App. 2a. Over objections by counsel for Koons Buick, Judge Lee instructed the jury that, if it found that Koons Buick violated TILA, it was required to award twice the finance

charge – without regard to the $1000 cap on liability that always had applied to consumer loans under clause (i). Pet. 9. The jury awarded Nigh $24,192.80 on the TILA claim and $4000 on the state-law claim. Judge Lee then awarded Nigh attorneys' fees and court costs totaling $26,129.10. Pet. App. 53a. The total liability came to more than $54,000, even though Nigh had suffered no actual damages; the TILA claim was a strict-liability claim requiring no proof of bad intent on the part of Koons Buick; there was no evidence of "repeated willful violations" of state law, so Judge Lee found no need for deterrence (Pet. App. 45a); and only $4000 ever changed hands in the transaction at issue.

On appeal, the Fourth Circuit panel majority assumed that the word "subparagraph" could mean *any* subdivision of Section 1640 – so that "this subparagraph" could just as easily mean clause (ii) as subparagraph (A). The majority also expressed indifference to objective indicia of Congress's intent in Section 1640, as it is manifested anywhere outside the specific language of subparagraph (A) of Section 1640(a)(2). "Our responsibility is thus not to determine whether there is evidence that 'Congress intended to override the Fourth Circuit's' precedent (or any circuit precedent for that matter)." Pet. App. 12a (quoting the dissent). "It could well be, as Judge Gregory concludes [in dissent], that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995." *Id.* at 13a. "Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent." *Ibid.* The panel did not address the Seventh Circuit's decision in *Strange*, but held that, by singling out the subset of loans formerly covered by clause (i) for specialized treatment (with a "new maximum and minimum" (*id.* at 11a)) in clause (iii), Congress amended the minimum and maximum liability provisions applicable to clause (i) as well. *Ibid.*

Judge Gregory dissented, asserting three primary quarrels with the majority's reasoning. *First*, the facts that the $100/$1000 provision had applied to both clauses (i) and (ii) since clause (ii) was added in 1976, and Congress did nothing to amend those clauses, compelled the conclusion that the $100/$1000 provision still applies to clauses (i) and (ii). Pet. App. 19a. *Second*, Judge Gregory pointed to inconsistencies that the panel's new interpretation created within Section 1640(a)(2). Because the "under this subparagraph" language was *not* included in the newly appended clause (iii), the new clause was structured differently from the pre-existing ones. Also, the phrase "under this subparagraph" was included in subparagraph (B) of Section 1640(a)(2), and clearly referred to all of subparagraph (B). To limit "subparagraph" to clause (ii) in the first instance, but to interpret it to mean all of subparagraph (B) in the second, created an internal inconsistency in the majority's interpretation of the statute. *Id.* at 21a.

Third, Judge Gregory would have followed an interpretation that did not change the meaning of the word "subparagraph." Pet. App. 20a-21a. He believed that if it previously meant all of (A), it still meant all of (A), except that (iii) had been enacted as a specific exception. *Id.* at 19a-20a & n.2. The majority responded to this argument, disagreeing with Judge Gregory because in its view he treated "subparagraph" as "a term of art not referencing a distinct subparagraph at all." *Id.* at 12a. Although Judge Gregory's opinion flirted with the issue, and the Seventh Circuit in *Strange* drew a distinction between "subparagraph" (A) and what it termed "subparts" (i), (ii), and (iii), none of the opinions below considered seriously whether words like "subparagraph" and "clause" have consistent meaning in legislative drafting.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit majority below is in error for several independent but complementary reasons. Initially, the majority purported to conduct a plain-meaning interpretation of the civil liability provisions of TILA, but

instead undertook a myopic analysis of one subparagraph of TILA, concluding that the separation of the statutory liability provision by a comma from one clause rendered it applicable only to that clause. The court undertook no effort to achieve the natural reading of the section, or to construe it "reasonably, to contain all that it fairly means." ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

The error is confirmed by a plain-meaning analysis of the subparagraph that respects all the terms of the subparagraph, TILA generally, and in fact the broader structure of the U.S. Code. Congress used the phrase "under this subparagraph," rather than "under this paragraph" (as the phrase read before the 1974 amendments) or "under this clause" (as would be required to limit the liability provision only to part of subparagraph (A)). Congress did so for a reason, and interpreting the $100/$1000 limitation to apply to all of subparagraph (A), with the exception of a specific carve-out in clause (iii), respects the phrase "under this subparagraph" as it is used throughout TILA and throughout the U.S. Code.

This plain-meaning analysis also respects Congress's clear intent throughout the enactment and amending of TILA. The court below disavowed any responsibility to consider Congress's intent when interpreting the statute. Pet. App. 12a, 13a. But a proper consideration of the "'objectified' intent" expressed by the language of the statute and its amendments (see SCALIA, *supra*, at 17), or of the overwhelming and clear evidence of intent reflected in the legislative history of TILA and its amendments, would have precluded the court of appeals' construction. Congress's intent is crystal clear that its use, and retention, of "subparagraph" to refer to (A) has substantive meaning, and that the amendments to Section 1640 since 1968 have not narrowed the breadth of the $100/$1000 provision.

The triumph of the natural reading of subparagraph (A) over the reading accepted by the majority below is demonstrated further by considering the absurd results under the Fourth Circuit's interpretation – under which class action liability,

liability for bad-faith conduct in consumer lease transactions, and criminal punitive liability all are likely to be much *less* than the liability imposed in this case. Interpreting the statute to apply the $100/$1000 provision to clause (i) as well as clause (ii) produces defensible results.

Finally, the Fourth Circuit's cavalier disregard for its interpretive responsibilities below risks placing in turmoil an industry that is central to the smooth operation, and to the recovery, of the U.S. economy. While doing nothing to advance broader policies underlying TILA, and in the name of "deference" to Congress's ability to amend the statute, the court imposed a scheme that threatens to harm consumer credit severely.

ARGUMENT

Although this case comes before the Court as a pure exercise of interpretation, arguably the Court's task of construing 15 U.S.C. § 1640(a)(2)(A) is not even one of statutory construction. "When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947). This is not such a case. Only "literal perversity or jaundiced partisanship can sponsor [the] particular meaning" (*ibid.*) of TILA urged by respondent and adopted by the court below. That interpretation triumphs the use of a comma over the plain meaning of the language Congress employed, the meaning given to that same language elsewhere in the same statute, the structures of Section 1640 and of TILA, the history of the enactment of and amendments to Section 1640, and the interpretations given to the section by the near unanimity of courts and commentators.

In addition, the interpretation that the court below gave to Section 1640(a)(2)(A) threatens such harm to the consumer lending industry that it does violence to any understanding of responsible public policy.

I. The Decision Below Cannot Be Reconciled with the Plain Meaning of Section 1640(a)(2)(A) or with the Congressional Intent Underlying TILA

A. In *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-455 (1993), it was quotation marks. In this case, it is a comma: The majority below held that the $100/$1000 limitation in subparagraph (A) was placed "wholly within (ii)" (Pet. App. 11a), and respondent defends that holding by arguing that "the limitations in (ii) are separated from the first two types of award calculations only by a comma" (Br. in Opp. 9-10). In both cases, this Court was faced with arguments that the use of punctuation overrode the natural reading of the respective statutes. This Court unanimously corrected the D.C. Circuit's error in 1993. Respondent's comma-based argument supporting the holding below ignores this Court's unequivocal guidance:

> A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning.

United States Nat'l Bank of Oregon, 508 U.S. at 454.

This Court does not hesitate to reject purported "plain-meaning" analyses that produce patently absurd results. See, *e.g.*, *United States Nat'l Bank of Oregon*, 508 U.S. at 454; *Nixon* v. *Missouri Municipal League*, 124 S. Ct. 1555, 1561 (2004) (rejecting an absolutist interpretation of the phrase "any entity" when that interpretation produced "strange and indeterminate results").[3] In this case, not only is the supposed plain meaning that relies on punctuation insupportable, there *is* a plain meaning of Section 1640(a)(2)(A), supported by the words

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[3] This mode of construction has a long pedigree: "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.).

Congress used, that respects Congress's clear intent. When such a "natural reading" appears and is consistent with other applicable principles of statutory interpretation, this Court will follow it. *General Dynamics Land Systems, Inc.* v. *Cline*, 124 S. Ct. 1236, 1240 (2004); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001).

1. Instead of blindly pursuing a reading supported by the purported placement of the $100/$1000 limitation within clause (ii), the court below should have inquired into the natural reading of TILA – of which the punctuation and structure of subparagraph (A) of Section 1640(a)(2) are only component parts. "Along with punctuation, [statutory] text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate taking their purport from the setting in which they are used.'" *United States Nat'l Bank of Oregon*, 508 U.S. at 454 (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). The natural reading of subparagraph (A) is achieved by treating its interpretation as "a holistic endeavor." *United Savs. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

The natural reading of subparagraph (A) applies the $100/$1000 statutory liability provision to the whole subparagraph (but for the carved-out clause (iii)), *not* merely to the second clause. Contrary to respondent's belief (Br. in Opp. 9-10), nothing about the fact that "only * * * a comma" separates the $100/$1000 statutory liability provision from clause (ii) renders the provision inapplicable to clause (i); in fact, clause (i) itself is separated from clause (ii) "only by a comma," rather than some "stronger" punctuation mark (such as a semicolon or a period).

And it is a common method of sentence construction to use a comma to separate a modifying phrase from a list of objects being modified. Thus,

> I went to the store to buy butter, eggs, flour, sugar, cinnamon, nutmeg, and apples, which can be used to make an apple pie, and vanilla ice cream.

Under the analysis of the panel below, and the analysis that respondent urges on this Court, the modifying phrase applies *only* to apples, because it is separated from the remainder of the sentence "only by a comma." Apparently respondent believes the hearer should assume that only apples are required to make apple pie. But like subparagraph (A), the apple pie recipe demonstrates that "the meaning of a sentence is to be felt rather than to be proved." *United States* v. *Johnson*, 221 U.S. 488, 496 (1911) (Holmes, J.). If the sentence is read naturally, the modifying clause above refers to the entire list, and at worst there is an ambiguity that readily can be clarified through further inquiry – "can you make an apple pie with only apples, or do you need all those things?" The constricted interpretation of TILA by the panel below, based on the fact that the modifying phrase in subparagraph (A) follows a list of clauses being modified, stopped short of asking this next question.

2. The natural reading of TILA is precisely a "textualist" interpretation – construing the statute "reasonably, to contain all that it fairly means." SCALIA, *supra*, at 23. Congress did not leave Section 1640, much less all of TILA, without substantial aids to interpretation, which clarify any possible ambiguity created by the punctuation and structure of subparagraph (A) as to the breadth of application of the $100/$1000 limitation. The clearest indication of the breadth of the $100/$1000 provision is the statute's express command that it applies to liability "under this subparagraph." Section 1640(a)(2)(A).

Like other words in TILA, "subparagraph" has meaning – in fact, it means the statutory unit designated by a capital letter in parentheses – thus, "(A)."[4] According to the *United States*

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[4] "[G]ood legislative drafting is characterized by a clear expression of intent, using a consistent terminology throughout." M. Douglass

Congress Data Dictionary of Legislative Documents, a "sub-paragraph" is

> [a] hierarchical structure of a measure. This level is contained directly within paragraphs. Levels contained within subparagraphs are clauses, subclauses, items, and subitems. Subparagraphs are normally enumerated with an uppercased alpha character within parentheses (*e.g.*, (A)).

See http://xml.house.gov/subparagraph.html. The same source describes "sections," "subsections," "paragraphs," "clauses," "subclauses," and so on, with the result that the descriptive terminology used by Congress for the structure of legislation is abundantly clear:

> 1640 is a "section";
>
> (a) is a "subsection";
>
> (1) is a "paragraph";
>
> (2) is a "paragraph";
>
> (A) is a "subparagraph";
>
> (i) is a "clause";
>
> (ii) is a "clause";
>
> (iii) is a "clause."

See *ibid.* The phrase "under this subparagraph," then, could refer only to subparagraph (A) – *not* to clause (ii).

It is important to recognize Congress's intent correctly when it uses internal cross-references. As the *Data Dictionary* explains, subparagraph is a "[u]nique name for the element so that it can be referenced." *Ibid.* And Congress does use these statutory elements for cross-referencing. A quick search of the

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Bellis, *Drafting in the U.S. Congress*, 22-1 STATUTE L. REV. 38, 43 (2001). Mr. Bellis in 2001 was the Deputy Legislative Counsel for the House of Representatives Office of Legislative Counsel. *Id.* at 38 n.1.

Westlaw database demonstrates that internal references to sections, subsections, paragraphs, subparagraphs, clauses, and subclauses are used multiple thousands of times throughout the United States Code. Section 1640 alone makes numerous internal cross-references that make sense only if the reader accords the proper, and consistent, meaning to the words "subparagraph," "paragraph," "subsection," "section," "title," "part," and "subchapter."

To pick one example, subsection (b) of Section 1640 permits a creditor to escape liability under TILA – "[a] creditor * * * has no liability *under this section* or section 1607 of this title or section 1611 of this title" – if the creditor timely discovers and corrects any TILA violation. 15 U.S.C. § 1640(b) (emphasis added). If "section" were given variable meaning, as "subparagraph" was in the courts below, "under this section" might be thought to refer only to *subsection* (b)[5] – so liability still might attach under subsection (a) of Section 1640, despite the subsection's unambiguous command that creditors be insulated from administrative, criminal, *and* civil liability. Of course that result is ridiculous; "under this section" in subsection (b) clearly refers to the civil liability provisions of Section 1640. But the example shows how ignoring the static meaning of these exceptionally common internal references threatens untoward results in interpreting all of TILA, as well as a vast array of statutes.

3. The Court need look no further to resolve this issue than the static definition that Congress accords to the word "sub-paragraph." But multiple other indicia of meaning are available to understand Congress's use of "subparagraph" within TILA. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the

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[5] Just as clause (ii) meets the *Webster's Dictionary* definition of "subparagraph," subsection (b) fits the dictionary definition of "section." See WEBSTER'S NEW WORLD DICTIONARY 1213, 1332 (3d College ed. 1988) (definitions of "section" and the prefix "sub-").

same terminology is used elsewhere in a context that makes its meaning clear." *Timbers of Inwood Forest*, 484 U.S. at 371. As Judge Gregory noted in dissent below, Congress used the phrase "under this subparagraph" in subparagraph (B) as well:

> This reading is made even more compelling when one considers that the phrase "under this subparagraph" in § 1640(a)(2)(B) indisputably applies to all of subparagraph (B). Similarly, the statutory cap following (2)(A)(ii) applies to all claims under subparagraph (A), with the exception of claims under (2)(A)(iii), which contains its own, discrete limit.

Pet. App. 21a. Other examples of Congress's consistent use of "subparagraph" abound throughout TILA. See, *e.g.*, 15 U.S.C. § 1602(aa)(2)(A) ("under this subparagraph"), (B) ("under subparagraph (A)"), (C) ("in subparagraph (A)"); *id.* § 1605(f)(2)(A) ("in subparagraph (B)"); *id.* § 1606(a)(1)(B) ("under subparagraph (A)"). And in the Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 – the statute that the panel majority below held altered the meaning of the word subparagraph (Pet. App. 12a) – the one time that Congress used the term "subparagraph," it was using the word as it is defined in the *Data Dictionary*. See Pub. L. No. 104-29, § 3 ("except as provided in subparagraph (B)") (amending 15 U.S.C. § 1605).

B. The legislative history of Section 1640 also compels the conclusion that the $100/$1000 statutory liability provision applies to all of subparagraph (A), except for the specifically carved-out clause (iii).

1. Congress knows how to change the designations "paragraph," "subparagraph," and "clause," when amendments to a statute require it, and has done so numerous times when amending TILA. As enacted in 1968, the TILA civil liability provision (Section 1640) read:

> (a) Except as otherwise provided in this section, any creditor who fails * * * to disclose to any person any information required * * * to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability *under this paragraph* shall not be less than $100 nor greater than $1000; and
>
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

Pub. L. No. 90-321, § 130 (emphasis added), quoted in Elwin Griffin, *The Truth and Nothing but the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345, 413 n.451 (2003). In 1974 Congress added an actual damages provision, which became paragraph (1), changed the former paragraph (1) to (2), and changed the former paragraph (2) to (3). See Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1517-1518 (1974), cited in Griffin, *supra*, at 413 n.451.

Congress also added a class-action liability maximum of $100,000 (since changed to $500,000) or one percent of the creditor's net worth, and bifurcated the new paragraph (2) into subparagraphs (A) and (B). See Pub. L. No. 93-495, § 408, 88 Stat. at 1517-1518, cited in Griffin, *supra*, at 413 n.451. As amended, paragraph (2) provides for liability in the amount of:

> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow, * * * and the total recovery in such action shall not be more than the lesser of $100,000 or 1 per centum of the net worth of the creditor.

Ibid. (emphasis added).[6] In these amendments, Congress changed "paragraph" to "subparagraph" as required to preserve the consistent meaning of the internal references.[7]

2. After TILA was amended in 1974 (adding the actual damages and class-action provisions), the statutory liability provision was contained in subparagraph (A), and there were no clauses (i), (ii), and (iii). Also, the statute did not cover consumer leases. This changed in 1976, when Congress passed the Consumer Leasing Act, adapting the TILA civil liability provisions to violations in consumer lease transactions. See Pub. L. No. 94-240, § 4, 90 Stat. 257, 260 (1976) (amending Section 1640(a)(2)(A) by "insert[ing] '(i)' after '(A)', and insert[ing] after 'transaction' a comma and the following: 'or (ii) in the case of an individual action relating to a consumer lease'"certain limitations). After 1976, subparagraph (A) read:

> (A)(i) in the case of an individual action twice the amount of the finance charge in connection with the transaction, or
>
> (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000.

Like subparagraph (A) currently, the $100/$1000 statutory liability provision was separated "only by a comma" from the

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[6] Subparagraph (B) was amended in 1976 to raise the maximum liability for class actions to $500,000 or one percent of the creditor's net worth (Pub. L. No. 94-240, § 4(2), 90 Stat. 257 (1976)), and again in 1980 to add the phrase "under this subparagraph in any class action [or] series of class actions arising out of the same failure to comply by the same creditor" (Pub. L. No. 96-221, § 615(1), 94 Stat. 132 (1980)).

[7] Congress did so at least one other time in Pub. L. No. 93-495. "Section 130(c) of such act (15 U.S.C. § 1640(c)) is amended by striking out "chapter" and inserting in lieu thereof "title." Pub. L. No. 93-495, § 407(c).

text of clause (ii), so TILA as amended in 1976 contained the same arguable ambiguity – which exists only if one ignores the meaning of the statutory term "subparagraph" – as to whether the $100/$1000 provision reached clause (i) as well as clause (ii). But given Congress's ability, demonstrated just two years before, to change "subparagraph" to "clause" if it chose, its failure to do so must have meaning. "It was not surprising that Congress retained the word 'subparagraph' because section 130(a)(2) [Section 1640(a)(2)] still contained two subparagraphs, (A) and (B)." Griffin, *supra*, at 414 n.453.

There is another reason to understand the 1976 amendments not to alter the application of the statutory liability cap to clause (i). The Consumer Leasing Act "incorporate[d] the civil penalty provisions of the existing Truth in Lending Act." S. REP. NO. 94-590, 94th Cong., 2d Sess. 8 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 438. The civil penalty for violations of the Consumer Leasing Act "is intended to represent a civil penalty equivalent in dollar amount to that imposed on other creditors." *Ibid.* Interpreting the $100/$1000 provision as applying only to clause (ii) would not be "incorporat[ing]," but coopting.

Perhaps because of this unequivocal legislative history, courts were not confused before 1995. See, *e.g.*, *Purtle* v. *Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996); *Cowen* v. *Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995); *Mars* v. *Spartanburg Chrysler Plymouth*, 713 F.2d 65, 67 (4th Cir. 1983); *Dryden* v. *Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981).[8]

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[8] Respondent appears to contend that, contrary to the unanimous interpretation by the courts of appeals, the pre-1995 version of Section 1640(a)(2)(A) should be read to apply the $100/$1000 statutory liability provision only to clause (ii) of subparagraph (A). See Br. in Opp. 10-11 ("Yet it is equally plausible that Congress intended either to correct the erroneous assumption (reflected in *Mars*) that the limits stated at the end of (ii) applied to damages under (i)."). Under respondent's view, then, Congress removed the statutory liability provision with the Consumer Leasing Act, in 1976. That view cannot be reconciled with

3. Congress again amended Section 1640 in 1995. See Pub. L. No. 104-29, § 6. Congress was concerned about "the difficulty of proving actual damages and the increase in costs involved in *mortgage* lending." H.R. REP. NO. 104-193, 104th Cong., 1st Sess. 99 (1995) (emphasis added).

Congress's especial concern resulted in carving the subset of "credit transaction[s] not under an open end credit plan that [are] secured by real property or a dwelling" out of clause (i), and placing them in a new clause (iii). See Pub. L. No. 104-29, § 6. This carve-out was necessary only because Congress decided to *increase*, to $200 minimum and $2000 maximum, the statutory civil liability for violations of TILA in this subset of consumer loan transactions. When creating clause (iii), Congress moved the "or" from between clauses (i) and (ii), to between clauses (ii) and (iii). *Ibid.* No other change was discussed or made to Section 1640(a)(2)(A).

It is nonsensical to conclude that Congress's special concerns about a certain subset of consumer loans – which it dealt with by doubling the minimum and maximum statutory liability for that subset – caused it silently to *eliminate* the cap on liability for all other consumer loans. But this is the conclusion reached by the courts below – in the case of the Fourth Circuit majority, in full recognition that it likely was doing violence to Congress's intent: "It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995." Pet. App. 13a.

Respondent's apparent view of subparagraph (A), that the *1976* amendments (again, silently) removed the cap on liability for consumer loans (see note 8, *supra*), is even less reconcilable with Congress's clear intent in the 1995 amendments. For, if

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the legislative history of the 1976 amendments or with the meaning of the precise drafting term "subparagraph." As discussed further *infra*, that view is even less tenable in light of the legislative history of the 1995 amendments.

the $1000 liability cap was eliminated in 1976, Congress's special concerns about creditor abuses in the subset of consumer loans dealt with in clause (iii) caused Congress to *limit* liability, from a potential of tens of thousands of dollars when uncapped (as in this case), to $2000 under Section 1640(a)(2)(A)(iii). This is a non sequitur, in view of the unambiguous goal to "increase[] the statutory damages available in closed end credit transactions secured by real property or a dwelling" (H.R. REP. NO. 104-193, at 99).

A brief glance at Congress's other activity at the time that it considered and enacted the Truth in Lending Act Amendments of 1995 demonstrates that – just as in 1974 and 1976 – Congress knew exactly what it meant when it preserved the word "subparagraph" in Pub. L. No. 104-29, rather than changing the word to "clause" (as would be required to support the interpretation urged by respondent and accepted by the court below). In a report on H.R. 1858, a bill containing several amendments that ultimately became part of Pub. L. No. 104-29, the House of Representatives Committee on Banking and Financial Services myriad times employed the designations "paragraph," "subparagraph," and "clause," in manners consistent with the definitions of those terms in the *Data Dictionary* (see pp. 13-14, *supra*) and with the use of "subparagraph" in TILA. See, *e.g.*, H.R. REP. NO. 104-193, at 28 (amending a statutory section "by redesignating clauses (iii) and (iv) (as amended by subparagraph (A) of this paragraph) as clauses (i) and (ii)").

Indeed, Congress again showed that it knew how specifically to redesignate a "subparagraph" as a "clause," if it chose to do so. See H.R. REP. NO. 104-193, at 34 (amending a different statutory section "by redesignating subparagraphs (A), (B), and (C) as clauses (i), (ii), and (iii), respectively, and moving the left margins of such clauses 2 ems to the right"). Significantly, neither in the proposed amendments to Section 1640 contained in H.R. 1858 (see H.R. REP. NO. 104-193, § 111, at 9), nor in the version ultimately passed in Pub. L. No. 104-29, did Congress change the word "subparagraph" to "clause."

4. Congress's intent in 1968, 1974, 1976, and 1995 was crystal clear, and is amply demonstrated by considering the interplay of statutory liability caps under subparagraph (A). The same result also is reached if the Court considers the statutory minimum liability in subparagraph (A), which is $100 for clauses (i) and (ii), and $200 for clause (iii). See p. 3, *supra*. There is no dispute that Congress enacted in 1968 a $100 minimum liability for consumer loan transactions. See 1968 U.S.C.C.A.N. at 1976. As this Court held in *Mourning* v. *Family Pubs. Serv., Inc.*, 411 U.S. 356, 376 (1973), the $100 minimum liability "allow[ed] imposition of a civil penalty in cases where no finance charge is involved but where a regulation requiring disclosure has been violated. * * * [I]mposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined." The Seventh Circuit considered a similar situation in *Strange*, in which double-the-finance-charge liability was $54.72 – *less* than the $100 minimum. See 129 F.3d at 945. Under the interpretation urged by respondent, and accepted by the court below, no longer is there any significant incentive for borrowers in small consumer loan transactions to pursue TILA remedies against creditors. This result is directly antithetical to the entire purpose of the statutory minimum civil liability provision.

C. The panel's reading of Section 1640(a)(2)(A) inevitably would yield untenable results, when compared with indisputable interpretations of other TILA liability provisions. This Court requires an examination of how the section operates with the rest of the statutory scheme (*Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)):

> Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

In *Davis*, an 8-1 decision, this Court thought it "implausible at best * * * that Congress consented to discriminatory taxation of the pensions of retired federal civil servants while refusing to permit such taxation of current employees." *Id.* at 810. Without "[any]thing in the statutory language or even in the legislative history suggest[ing] this result," the Court would not accept such an implausible interpretation. *Ibid.* Of course, this case is easier: respondent's interpretation of Section 1640 is readily overborne by the plain language that Congress employed in the section. See pp. 12-16, *supra*. But, even if it were not, an interpretation of subparagraph (A) based on the fact that the $100/$1000 provision is separated "only by a comma" (Br. in Opp. 10) from clause (ii) is insupportable based on the violence done to the overall TILA liability scheme.

1. Under respondent's interpretation, an innocent, technical violation of TILA in a car loan could produce substantial statutory punitive liability under clause (i) of subparagraph (A). But an egregious violation – or multiple violations (see 15 U.S.C. § 1640(g)) – of TILA in the case of a car lease could only produce, at the most, $1000 in statutory damages under clause (ii). Those results could occur regardless of – and in fact, inversely to – the relative culpability of the creditor. This result undermines Congress's intent as expressed in the legislative history of the 1976 amendments that violations in leases "represent a civil penalty equivalent in dollar amount to that imposed on other creditors." 1976 U.S.C.C.A.N. at 438. It also ignores Justice Holmes's admonition to "us[e] common sense in construing laws a saying what they obviously mean." *Roschen* v. *Ward*, 279 U.S. at 339.

2. Comparing loans subject to clause (i) with those subject to clause (iii) produces similar results. If a consumer creditor enters into a loan transaction secured by a dwelling with finance charges running tens of thousands of dollars, the creditor's TILA liability is $2000 plus attorneys fees, even if the creditor multiply violates TILA and Regulation Z. But if a member of *amici* lends money for the purchase of an automobile and makes

an innocent error in calculating the cost of credit, the creditor's liability under TILA is uncapped – and, as in this case, potentially much greater than on the home loan. This makes no more sense than the scenario above, and directly conflicts with Congress's stated goal to "increase[] the statutory damages available in [the specific] transactions" identified in clause (iii). H.R. REP. NO. 104-193, at 99.

3. A similarly untenable result obtains in the class action context. Class-action recovery is capped at "$500,000 or 1 per centum of the net worth of the creditor." Section 1640(a)(2)(B). Under the interpretation of subparagraph (A) urged by respondent, and accepted by the panel majority below, an error in TILA disclosures in one loan transaction might subject a creditor to uncapped liability of two times the finance charge. On the other hand, if that same creditor has a net worth of $2.5 million, and makes the same error in *multiple* loan transactions involving different borrowers, its liability is capped at one percent of its net worth, or $25,000. The liability in the individual action in this case is the same as the creditor's total exposure in the class action – and importantly, there is "no minimum recovery * * * as to each member of the class." Section 1640(a)(2)(B).

4. The criminal penalties under 15 U.S.C. § 1611 are yet another demonstration of the absurd result of the panel's interpretation of subparagraph (A). This Court has treated the statutory civil liability provisions of Section 1640 as "modest" in nature. See *Mourning*, 411 U.S. at 376 ("Since the civil penalty prescribed is modest * * *, we need not construe this section as narrowly as a criminal statute providing graver penalties, such as prison terms."). But the maximum *criminal* fine under Section 1611 is $5000, approximately one-fifth of the civil liability imposed in this case. It cannot be that the "modest" civil penalty, which can be imposed without any proof of bad intent, exceeds the maximum punitive monetary liability, which can be imposed only on proof beyond a reasonable doubt of "willful[ness] and know[ledge]." Section 1611.

5. Finally, the result reached below eviscerates the $100 minimum liability of subparagraph (A) as it applies to most consumer loans. In all cases where the finance charge is less than $50 (such that twice the charge is less than $100), or "no finance charge is involved," Congress's intent to impose a modest civil penalty in all consumer loan and lease transactions (*Mourning*, 411 U.S. at 376) is undermined. This Court should not countenance an interpretation of TILA that writes this provision out of the Act. See *Alaska Dep't of Env'tl Conservation* v. *EPA*, 124 S. Ct. 983, 1002 n.13 (2004) ("[A] cardinal principle of statutory construction [is] that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted).

II. The Harmful Impact that the Decision Below Would Have on the Consumer Lending Industry Cannot Be Reconciled with Congress's Intent as Expressed in TILA or with Responsible Public Policy

A. *Amici* discussed in their brief supporting the petition for certiorari the magnitude of the industry threatened by the holding below. See Brief of the American Bankers Ass'n *et al.* 9-16. The sheer volume of automobile loans yearly that implicate the rule of the courts below is staggering. On very conservative estimates, increased exposure to consumer creditors, like members of *amici*, runs to more than a billion dollars yearly, even at the very low average interest rates in today's struggling economy. *Id.* at 10. On a per-institution basis, some 10% of a creditor's total assets are implicated by auto loans. *Id.* at 11. And auto loans tell only a part of the picture. $233 billion in debt in home-equity lines of credit, at an average interest rate of 7%, is covered by clause (i) (because lines of credit are open-ended, not closed-ended as required for clause (iii)). *Id.* at 12. As of March 5, 2004, total consumer credit outstanding was more than $2 trillion. See *Federal Reserve Statistical Release*

G.19: Consumer Credit (March 5, 2004), available at http://www.federalreserve.gov/releases/g19/Current/.

Given the vastness of the industry affected by this case, the panel majority's cavalier suggestion that Congress can simply amend TILA to correct the Fourth Circuit's error violates any concept of responsible public policy. See Pet. App. 13a ("Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent."). Consumer spending is vital to the U.S. economy – in recent years making up more than two-thirds of total economic activity. See *Consumer Confidence Jumps*, CNN MONEY (Nov. 25, 2003), available at http://money.cnn.com/2003/11/25/news/economy/confidence/index.htm. In 2003, consumer spending made up $7.75 trillion of a total GDP of $10.9 trillion. *News Release: Gross Domestic Product* (Mar. 25, 2004), available at http://www.bea.gov/bea/newsrel/gdpnewsrelease.htm. For this reason, economists and policymakers look to consumer confidence indices when setting economic policy and predicting future economic activity. See *Gross Domestic Product Jumps Again, Raising Hopes for Durable Recovery*, THE DETROIT NEWS (Feb. 28, 2004), available at http://www.detnews.com/2004/business/0402/28/business-76973.htm.

Of consumer spending, consumer credit makes up substantial percentages. As of 1997, credit card spending made up some 22% of overall consumer spending. See DAVID EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC 91 (2000). Assuming that same percentage in 2003, credit card spending approximated $1.7 trillion last year. All of this credit activity may be diminished if the cost to creditors from potential TILA liability increases dramatically. For this reason, victories for TILA plaintiffs under the panel's new rule would be harmful to consumers nationwide because of increases in the cost of credit. The potential for harm to the national economy from the panel's new rule should not be ignored.

B. It is no answer to say that the increased civil liability advances Congress's goal of increasing disclosures under TILA. Even if that were true, this Court disapproves construing statutes to require such unbridled pursuit of a single purpose. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) ("'[N]o legislation pursues its purposes at all costs * * * – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'") (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)).

But also, no matter how draconian the penalty, the complexity of the disclosure requirements under TILA and Regulation Z virtually guarantees that technical violations of their provisions will occur. Throughout the history of TILA, Congress has been aware of the challenges the "highly technical" rules pose to creditors:

> Creditors * * * have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the Act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation.

S. REP. NO. 96-73, 96th Cong., 1st Sess. (1979), reprinted in 1980 U.S.C.C.A.N. 280, 281. Although Congress amended TILA in 1980 in part to rectify this problem, compliance is still a difficult task. A former Chairman of the Federal Deposit Insurance Corporation stated just nine years ago that "the complexity of Regulation Z is such that the FDIC cited more than 2,700 of the 3,500 institutions that we examined in 1994 for at least one violation." *Hearings on S. 650 Before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess., at 9 (1995) (statement of FDIC Chairman Ricki Helfer). As a result, the cost to financial institutions of

complying with TILA is substantial. "[A] few regulations are clearly very costly. Truth in Lending, for example, appears in more than one study as a major source of regulatory cost." Gregory Elliehausen, *The Cost of Bank Regulation: A Review of the Evidence*, Federal Reserve Staff Study 171, at 29 (1998), available at http://www.federalreserve.gov/pubs/staffstudies/1990-99/ss171.pdf.

As courts and commentators have observed, TILA and Regulation Z together create something of a "trap for the unwary creditor." See John W. Edmonds, III & George W. Taylor, Jr., *Truth and Consequences*, 35 WASH. & LEE L. REV. 367, 391 (1978) ("[TILA] was a well-intentioned statute. Unfortunately, it seems to serve mostly as a trap for the unwary creditor, increasing the cost of credit extensions and eliminating the small credit extender from the market as opposed to achieving benefits for the consumers on whose benefit it was enacted."); see also Pet. 18 (discussing authorities). Respondent's counsel observes on his Internet site that "[n]early every car transaction contains one or more violations of a statute or regulation."[9]

Importantly, the massively increased TILA liability that was brought about by the panel's decision will not result in improved disclosures by creditors like members of *amici*. Those institutions already are largely successful at meeting their TILA obligations; and those violations that do occur are the result of the hyper-technical nature of the statutory and regulatory requirements and will not be cured by imposing greater punishment. And TILA has already had the effect that it was designed to have, with the universal recognition of the $1000 cap on statutory liability. The first decade of enforcement saw thousands of TILA claims filed yearly, but by 1985 that number had dwindled to 245. See ROHNER & MILLER, *supra*, ¶ 12.01, at 785 n.1. Yet that number will surely rise –

[9] See http://www.alexandriacitywebsite.com/blankingship.htm. Counsel's Internet website also advertises that these "statutes and regulations" can be used "to escape a bad car deal."

perhaps dramatically – if the uncapped liability envisioned by the decision below for no-harm TILA violations is unleashed. So respondent and others like him would be the only beneficiaries of the panel's rule, and the cost of their windfalls would be borne by other consumers. And the windfall for plaintiffs, and for their counsel, would be won at the risk of great harm the consumer credit industry – and, thereby, to the national economy.

* * * * *

To hold that the Fourth Circuit correctly construed Section 1640 to provide for unlimited civil penalties for those loans covered by clause (i), this Court must *both* "presum[e] that 'the legislature was ignorant of the meaning of the language it employed,'" *BedRoc Limited, LLC* v. *United States*, 124 S. Ct. 1587, 1595 (2004) (plurality opinion) (quoting *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)), *and* fail to "'seek guidance from every reliable source,'" *BedRoc*, 124 S. Ct. at 1598 (Stevens, J., joined by Souter and Ginsburg, JJ., dissenting) (quoting AHARON BARAK, JUDICIAL DISCRETION 62 (Y. Kaufmann transl. 1989)). The Court should not do so. Both the precise legislative drafting term "subparagraph" and all indicia of legislative intent and responsible public policy preclude the conclusion reached below, and it should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA AS *AMICUS CURIAE*

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STATEMENT OF INTEREST[1]

1. The Commercial Law League of America (CLLA) is a 109-year-old national organization of attorneys, commercial collection agencies, and other experts in credit and finance actively engaged in the fields of commercial law and bankruptcy and reorganization. The CLLA is the publisher of the award-winning *Commercial Law Journal* and *Commercial Law Bulletin*. It has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable, and efficient administration of commercial and bankruptcy cases for all parties-in-interest. The League has been firmly committed to policing its own industry and has regularly provided articles and presentations to its members on consumer and commercial law issues.

2. Through its representatives, the CLLA has testified before Congress on numerous occasions, and the League has provided expert testimony in the fields of collections and bankruptcy and reorganization. The League has appeared as an *amicus curiae* before this and other federal courts in a number of cases. The vast majority of the League's membership represent credit grantors in collection disputes, and this case could have a significant impact on the League's members and their clients.

SUMMARY OF ARGUMENT

Petitioner espouses the decision in *Strange v. Monogram Credit Card Bank of Georgia*, 129 F.3d 943 (7th Cir. 1997). The Commercial Law League of America asserts that the reasoning of that case is defective and inconsistent with the rules of legislative construction adopted by this Court.

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[1] In blanket letters of consent filed with the Clerk, the parties have consented to the filing of *amicus* briefs in this case. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no one other than *amicus* made a monetary contribution to the preparation or submission of this brief.

Respondent's position gives effect to each portion of Section 1640(a)(2)(A), whereas Petitioner's argument renders Section 1640(a)(2)(A)(iii) meaningless.

ARGUMENT

INTRODUCTION

Prior to a 1995 amendment, 15 U.S.C. § 1640(a)(2)(A) provided that a creditor who violated the Truth in Lending Act (TILA) was liable in an amount equal to the sum of:

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 percentum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000.

Prior to the 1995 amendment, the Court of Appeals for the Fourth Circuit had interpreted that final clause establishing the $100 minimum and the $1,000 maximum as applying to claims under both (A)(i) and (A)(ii). *See Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983).

The 1995 amendment changed Section 1640(a)(2)(A) to provide that TILA violators are liable for:

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is

> secured by real property or a dwelling, not less than $200 or greater than $2,000. . . .

The Court of Appeals for the Seventh Circuit has (without substantive discussion) applied the *Mars* approach to the current version of the statute. *Strange v. Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997). In the case at Bar, the Court of Appeals for the Fourth Circuit held that the 1995 amendment restricted the $100/$1,000 limitation on statutory damages solely to claims under Section 1640(a)(2)(A)(ii). While it both politically and professionally dislikes the potential outcome that may occur in unusual or extreme cases, the CLLA believes that this was the correct statutory interpretation.

I - *MARS* IS NO LONGER RELEVANT

The starting point in discerning congressional intent is the existing statutory text, and not the version of TILA that predated it. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999). Since *Mars* was decided under the old statute it is not an appropriate starting point. *Strange* is also not an appropriate starting point, because it relied upon cases that were decided prior to the 1995 amendment, and the Seventh Circuit engaged in no independent analysis of the effect of the amendment on the potential recovery to a prevailing plaintiff.

II - THE STATUTE IS CLEAR

When the statute's language is plain, "the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917).

Petitioner presents a cogent argument based upon House Legislative Counsel's Manual on Drafting Style § 341(F)(2), at 52 (2d ed. 1995) and United States Senate Office of the Legislative Counsel, Legislative Drafting Manual § 129(d)(1), at 43 (1997). If Congress had formally adopted those manuals as a code construction act, such arguments would carry far more weight. Instead, these manuals appear to be non-statutory, after-the-fact guidance that is both outside of the statutory framework and not a part of the legislative history of Section 1640. The League suggests that reliance upon such outside references is little different than relying on a post-enactment statement of legislative intent, an approach that this Court has rejected. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291, 297, 115 S.Ct. 1489, 1492, 131 L.Ed.2d 395, 401 (1995). While the House and Senate manuals may represent aspirational guidelines for legislative drafting, they cannot change what Congress has actually written into that which it could have written.

The only ambiguity in Section 1640(a)(2)(A) is that which Petitioner seeks to manufacture. As the statute is worded there are three types of statutory penalties: Section 1640(a)(2)(A)(iii) deals with mortgage loans and sets $200/$2,000 limits on recovery; Section 1640(a)(2)(A)(ii) deals with consumer leases and sets $100/$1,000 limits on recovery; and Section 1640(a)(2)(A)(i) deals with other consumer transactions and sets a statutory penalty without a floor or a ceiling (except the ceiling created by the limits on the loans that are subject to that section). Petitioner argues that "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" applies to the entirety of Section 1640(a)(2)(A). If that were true, it would apply to Section 1640(a)(2)(A)(iii), creating a logical absurdity in which Congress added the new $200/$2,000 limits for mortgage loans and then simultaneously set an additional $100/$1,000 limit as an overlay to the new provision of the Act.

The limiting phrase in Section 1640(a)(2)(A)(ii) cannot apply to the whole of Section 1640(a)(2)(A), as that would emasculate Section 1640(a)(2)(A)(iii). Thus, the ambiguity asserted by Petitioner and the *amici* who have weighed in on its behalf is illusory. The plain meaning of the statute supports the interpretation given it by Respondent and the Court below. Respondent's position gives effect to each portion of Section 1640(a)(2)(A), whereas Petitioner's argument renders Section 1640(a)(2)(A)(iii) meaningless.

III - THE END DOES NOT JUSTIFY THE MEANS

Petitioner and the *amici* who support it express concern over the cost both to consumers and the lending industry if the decision of the Court below is affirmed. While the CLLA shares those concerns, it believes that they, too, may be illusory.

The stated concerns are somewhat questionable for four reasons. First, lenders who suffer losses due to dealer errors will be able to recover those losses through indemnification claims against the dealers whose errors cause the losses. (Admittedly, the occasional dealer may not be sufficiently solvent to indemnify the lender, but lenders who exercise good judgment in selecting their business partners and in mandating reserves should not have problems.) Second, the law already protects lenders against mere "picky and inconsequential errors." *Brown v. Payday Check Advance*, 202 F.3d 987, 991 (7th Cir. 2000), cert. denied, 531 U.S. 820; 121 S. Ct. 61, 148 L.Ed.2d 27 (2000). Third, creditors have an opportunity to avoid liability if they correct errors within sixty days of discovering them. 15 U.S.C. § 1640(b). Fourth, creditors can invoke the *bona fide* error defense contained in 15 U.S.C. § 1640(c), which provides that a creditor or assignee may not be held liable in any action brought under TILA if it shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

However, even if the policy concerns raised by Petitioner and its *amici* have any legitimacy, those concerns would not justify disregarding the plain language of the statute. Given a choice between effecting an undesirable outcome or disregarding the express wording of an unambiguous statute, the Court should neither enlarge nor restrict the effect of the Congressional act. *See Iselin v. United States*, 270 U.S. 245, 251, 70 L. Ed. 566, 46 S. Ct. 248, 62 Ct. Cl. 755 (1926); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978). The rationale for this policy is that this Court traditionally grants deference to "the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke*, 471 U.S. 84, 95, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985), *citing Richards v. United States*, 369 U.S. 1, 9, 7 L. Ed. 2d 492, 82 S. Ct. 585 (1962).

This Court recently reiterated these principles of legislative construction in *Lamie v. United States Trustee*, __ U.S. ___, 124 S. Ct. 1023; 157 L. Ed. 2d 1024 (2004). The CLLA urges the Court to hold firm in its adherence to these rules, favoring strict statutory construction over the questionable approach espoused by Petitioner and the *amicus curiae* appearing on its behalf.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE MICHIGAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, the Michigan Bankers Association (MBA) moves for leave to file the accompanying brief in support of the position taken by Petitioner Koons Buick Pontiac GMC, Inc. (Koons Buick). Counsel for both parties have consented to the filing of this brief.

The MBA, a nonprofit corporation, is the principal trade organization for the commercial banking industry in Michigan. The MBA membership includes all of the commercial banks having their principal offices in Michigan. The MBA acts on behalf of its member banks in matters affecting their trade or business.

The issue of whether Congress intended to repeal the 35-year-old $1,000 cap on the statutory penalty for a non-mortgage, non-lease violation of the Truth in Lending Act (TILA) is of great importance to the MBA's members, who are subject to TILA and its implementing regulations when engaged in their core business of consumer lending. The MBA's unique analysis of the 1995 amendment to TILA will assist this Court in its consideration of this important issue.

The Motion for Leave to File the accompanying Brief of the Michigan Bankers Association as *Amicus Curiae* should be granted.

Respectfully submitted,

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QUESTION PRESENTED

The *amicus curiae* will address the following question:

Did Congress impliedly repeal the $1,000 cap on the statutory penalty for a non-mortgage, non-lease violation of the Truth in Lending Act (TILA) when it amended TILA to provide a $2,000 cap on the statutory penalty for a TILA violation involving a closed-end home mortgage loan?

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. From 1968 until 1995, the statutory penalty for a TILA violation was capped at $1,000 in 15 U.S.C. § 1640(a)(2)(A). *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996); *Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981).

2. In 1995, Congress amended Section 1640(a)(2)(A) to increase the statutory penalty cap to $2,000 for TILA violations involving a closed-end home mortgage loan. *See* CONG. REC. S14568 (daily ed. Sept. 28, 1995) (statement of Senator Mack) ("the bill raises the statutory damages for individual actions from $1,000 to $2,000"); CONG. REC.

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

H9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum) (same).

3. Nowhere in the 1995 amendment's text or legislative history did Congress indicate it was repealing or abrogating the $1,000 statutory penalty cap that had applied to a non-mortgage, non-lease TILA violation since 1968. Pet. 6-7.

4. In 2000, Respondent Nigh purchased a used Chevrolet Blazer from Petitioner Koons Buick. He financed the purchase through Koons Buick. After several restructurings of the deal and Nigh's failure to make a single installment payment, Nigh returned the vehicle and sued Koons Buick in federal court under TILA. Pet. 7-9.

5. A panel of the United States Court of Appeals for the Fourth Circuit held that the 1995 amendment impliedly repealed the $1,000 statutory penalty cap for a non-mortgage, non-lease TILA violation, and it affirmed a $24,192.80 jury award on Nigh's claim for a TILA statutory penalty. Pet. 9-11. This award represented twice the finance charges that Nigh would have paid had he made all applicable installment payments to Koons Buick as promised. In fact, Nigh made no payments, and he suffered $0 in actual damages.

SUMMARY OF ARGUMENT

This Court should hold that Congress's 1995 TILA amendment did not impliedly repeal the $1,000 cap on the statutory penalty that has been in place for a non-mortgage, non-lease violation of TILA since 1968.

The 1995 amendment did nothing more than tack additional language on to Section 1640(a)(2)(A), thus creating the new $2,000 statutory penalty cap for a home mortgage TILA violation. If Congress had placed the exact same language in a new subparagraph (a)(2)(C), rather than adding it to the existing language in subparagraph (a)(2)(A), there would be no dispute. This innocent Congressional choice of textual position, with nothing more, should not be construed as specific intent to abrogate a statutory penalty damage cap that has been in place for more than 35 years, particularly where there is not a shred of legislative history that suggests a Congressional intent to do so.

The panel's interpretation also raises the same troubling due process concerns this court addressed last term in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, (2003). The panel's judicial repeal of the statutory penalty cap (a) imposes liability without regard to culpability, (b) creates a substantial disparity between penalty and actual damages, and (c) results in significant disparities with the damages awarded in comparable cases. The potential constitutional problems inherent in the panel's construction of Section 1640(a)(2)(A) provide a separate and additional reason to reject that construction.

Finally, the panel's interpretation is nothing short of a disaster for consumers and the economy. The considerable risk that results from uncapped liability for non-mortgage, non-lease TILA violations will inevitably be borne by consumers in the form of increased credit costs. This harm can be avoided simply by enforcing Congressional intent as evidenced in the 1995 amendment and Section 1640 itself.

ARGUMENT

I. THE PLAIN TEXT OF THE 1995 AMENDMENT DID NOT REPEAL THE $1,000 CAP FOR A NON-MORTGAGE, NON-LEASE VIOLATION OF TILA.

As Koons Buick explains in its merits brief, the plain language of Section 1640 mandates reversal of the Fourth Circuit's decision. The $1,000 statutory penalty cap applies to "this subparagraph," a term that Congress uses to refer to the third-level subdivision of a statutory section that begins with a capitalized letter.[2] Since the statutory penalty for a non-lease, non-mortgage transaction is contained in and defined by Section 1640(2)(A) – a third-level subdivision beginning with a capitalized letter – the $1,000 cap applies to such a transaction.

The exact same result is reached by examining Congressional intent as embodied in the plain text of the 1995 amendment. The amendment added a third clause to Section 1640(a)(2)(A), and moved an "or" to accommodate the new clause. The additional text is very limited – providing only that in pursuing a TILA claim, a plaintiff is entitled to actual damages plus:

> (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000.

[2] *See, e.g.*, United States Congress Data Dictionary of Legislative Documents, available on the official House of Representative website at http://xml.house.gov/subparagraph.html (defining the term "subparagraph").

15 U.S.C. § 1640(a)(2)(A)(iii). The limited action Congress took in enacting the 1995 amendment did not modify any of the existing statutory text, other than moving the "or" to accommodate the new clause (iii). All the amendment accomplished was the addition of new language regarding the penalty cap on a home mortgage transaction.

If, instead of amending Section 1640(a)(2)(A), Congress had simply pasted the text of Section 1640(a)(2)(A)(iii) into a new Section 1640(a)(2)(C), there would be no dispute. The language of Section 1640(a)(2)(A) would be interpreted as it always has been, and the panel below would have followed the Fourth Circuit's decision in *Mars*, i.e., the statutory penalty for a non-mortgage, non-lease TILA transaction would have remained capped at $1,000. Congress's innocuous decision to place the new home mortgage cap in clause (A)(iii). rather than in a new subparagraph (C) or some other part of the statute, cannot be read as a wholesale revision of the existing penalty cap for a non-mortgage, non-lease consumer loan, a topic the amendatory language does not even purport to address. Had Congress intended the result the panel attributes to the 1995 amendment, then Congress would have certainly undertaken a more comprehensive revision of the entire Section 1640(a)(2)(A). Focusing on the amendment's language demonstrates the complete absence of any Congressional intent to abrogate the cap.

While a repeal of the cap on the statutory penalty for a non-mortgage, non-lease TILA violation would have been a far greater change in the statutory penalty scheme than the simple doubling of the cap for a home mortgage violation, there is not a shred of indicia that Congress even contemplated such a repeal, much less intended one. To begin, the legislative history is clear that the purpose of

the 1995 TILA amendment was to increase the statutory penalty cap for a lender who violated TILA in a closed-end home mortgage loan to $2,000 from the $1,000 cap that had otherwise applied to such loans under clause (i). *See* CONG. REC. S14568 (daily ed. Sept. 28, 1995) (statement of Senator Mack) ("the bill raises the statutory damages for individual actions from $1,000 to $2,000"); CONG. REC. H9516 (daily ed. September 27, 1995) (statement of Rep. McCollum) (same). The purpose had nothing to do with the statutory cap judicially abrogated by the panel.

In addition, it is undisputed that Congress did not express the intent the panel impliedly attributes to the amended statutory language. *See* Br. Opp. 10-11 (noting that "Koons Buick is correct that Congress did not state either way whether it intended the 1995 amendment to affect the scope of the term 'this subparagraph'"); Pet. App. 13a ("It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995."); Pet. App. 20a ("[T]here is no evidence that Congress intended to override the Fourth Circuit's longstanding application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii)") (Gregory, J., dissenting); Elwin Griffin, *Searching for Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 305 (2000) ("Congress did not change its mind about the meaning of that word [i.e., "subparagraph"], but instead neglected to make the necessary adjustment when it added a third part to accommodate transactions secured by real estate.").

Absent indicia of such legislative intent, this Court presumes that the Congressional revision did not work a change in the underlying substantive law. *Sale v. Haitian*

Ctrs. Council, Inc., 509 U.S. 155, 176 (1993) (rejecting asserted interpretation of statutory amendment because "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect" in the legislative history); *Clarke v. Sec. Indus. Ass'n, Sec. Pac. Nat'l Bank*, 479 U.S. 388, 405-06 (1987) (rejecting asserted change in statutory meaning by changing certain words when there was "nothing in the legislative history . . . indicating that this change in the wording had substantive significance"); *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (concluding that "Congress intended nothing by the change in language" "[b]ecause the legislative history contains no indication that the variation in the language had changed the meaning" of the statute).

That presumption is further buttressed by the numerous pre-1995 judicial interpretations of Section 1640(a)(2)(A), all of which construed the $1,000 cap as applying to "this subparagraph," i.e., a consumer loan and consumer lease described in subparts (i) and (ii) of subparagraph (a)(2)(A). *See, e.g., Purtle*, 91 F.3d at 800; *Cowen*, 70 F.3d at 941; *Mars*, 713 F.2d at 67; *Dryden*, 661 F.2d at 1191 n.7. It is a well-established maxim of statutory interpretation that Congress is charged with knowledge of these judicial interpretations of the statute and is assumed to have adopted them in its re-promulgation of the statute. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). For all these reasons, the panel's interpretation should be rejected.

II. THE PANEL'S INTERPRETATION UNNECESSARILY IMPLICATES DUE PROCESS PROBLEMS.

When interpreting a statute, a court should avoid construing the statutory language in such a way that raises a question of constitutionality. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (a statute should not be construed in such a way "that in turn could call upon the Court to resolve difficult and sensitive questions" of constitutional law). But the panel's interpretation of Section 1640(a)(2)(A) raises a significant question as to the Section's constitutionality under the Fifth Amendment's due process clause. Accordingly, the panel's interpretation should also be rejected on this secondary ground.

Last term, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), this Court analyzed the interplay between the Fourteenth Amendment's due process clause and the imposition of punitive damages under state law. Although punitive damages "serve the same purposes as criminal penalties," *id.* at 1520, defendants subjected to such damages in civil cases "have not been accorded the protection applicable in a criminal proceeding," *id.*, thus raising constitutional concerns. In striking down the punitive damage award in *State Farm*, this Court reiterated its three "guideposts" for reviewing the constitutionality of punitive damages:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id.; *accord BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Although not strictly applicable to this federal statutory penalty case, the Court's punitive damage guidelines are instructive in analyzing the due process implications of the panel's interpretation here. First, in the vast majority of TILA claims, the lender has neither intentionally nor fraudulently misrepresented the applicable finance charge, but has merely run afoul of the more than 250-page Regulation Z, which interprets TILA. *See* 12 C.F.R. Part 226. Such a technical violation does not evidence "an indifference to or a reckless disregard of the health or safety of others," *BMW*, 517 U.S. at 1521; rather, it is a simple mistake that causes only economic harm, if it causes harm at all.

Second, under the panel's interpretation of the 1995 amendment, the disparity between actual harm suffered and the statutory penalty can and often will be extreme. Here, for example, Nigh suffered $0 in actual damages. Assuming for purposes of mathematical calculation that the jury awarded $1 in nominal, actual damages, the $24,192.80 statutory penalty is more than 24,000 times actual damages. *Cf. State Farm*, 538 U.S. at 605-06 ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

Third, the panel's decision creates a substantial disparity between a statutory penalty imposed for a non-mortgage, non-lease TILA violation and other types of TILA violations. Whereas the penalty for a TILA violation in a home mortgage loan is now capped at $2,000, and the penalty in the consumer lease context is capped at $1,000, there is no hard cap for a non-mortgage, non-lease violation under the panel's ruling. So in Nigh's case, the jury was permitted to award more than $24,000 in a statutory penalty. Future cases may yield even more disparate results.

These is no logical basis for these disparities, demonstrating both the due process concerns that the panel's decision raises, and the rather absurd results the panel attributes to Congressional intent. For all these reasons, the panel's reading of the statute should be rejected.

III. THE PANEL'S DECISION IS A PUBLIC POLICY DISASTER.

Despite the best efforts of the banking industry to comply in all respects with TILA's requirements, the fact remains that Regulation Z (which interprets TILA) occupies nearly 250 pages in the Code of Federal Regulations. *See* 12 C.F.R. Part 226. The government regulatory scheme is breathtaking in its scope and complexity, making it nearly impossible for a financial institution to ensure that a transaction is letter perfect. As Respondent's counsel notes, "[n]early every car transaction contains one or more

violations of a statute or regulations."[3] *See also Hearings on S. 650 before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess., at 9 (1995) ("the complexity of Regulation Z is such that the FDIC cited more than 2,700 of the 3,500 institutions that [it] examined in 1994 for at least one violation").

Given the $2 billion in total outstanding consumer credit in the United States as of January 2004 (*see* http://www.federalreserve.gov/releases/g19/Current (visited Apr. 1, 2004), the potential penalty exposure for otherwise innocent TILA violations will be astronomical if the Fourth Circuit's judicial repeal of the statutory damage cap is upheld. This will invariably drive smaller institutions out of the consumer credit market entirely, and force larger institutions to pass on the costs to their customers in the form of higher finance charges. The resulting economic harm to consumers and the national economy can be avoided simply by enforcing Congressional intent as evidenced in the 1995 amendment and Section 1640 itself.

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[3] http://www.alexandriacitywebsite.com/Blankingship.htm (visited 3/30/04).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, AND THE U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The National Association of Consumer Advocates (NACA) is a nationwide, non-profit corporation whose over 1,000 members are private and public sector attorneys, legal services attorneys, law professors, law students, and non-attorney consumer advocates. NACA members' primary interest is the protection and representation of consumers. NACA's mission is to promote justice for all consumers and to provide a forum for information sharing among consumer advocates across the country. From its inception, NACA has focused on issues concerning abusive and fraudulent practices by businesses that provide financial and credit-related services.[1]

As part of promoting justice for consumers, NACA provides training on consumer law issues throughout the country, including auto-fraud training. In addition, NACA monitors and responds to various industry practices in retail car sales. The specific bait-and-switch practice underlying this case, referred to in the industry as a yo-yo sale, is used by certain dealers in deceptive and fraudulent ways. NACA members are familiar with the practices, and with specific laws, including the Truth in Lending Act (TILA), that were enacted to deter it. NACA follows the development of the cases in this area and consults with the federal agencies that enforce the federal laws that regulate this type of sale.

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[1] In blanket letters of consent filed with the Clerk, the parties have consented to the filing of *amicus* briefs in this case. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no one other than *amici* made a monetary contribution to the preparation or submission of this brief.

The National Consumer Law Center (NCLC) is a non-profit corporation established in 1969. One of its primary objectives is to provide assistance to legal services attorneys, governmental agencies, and private attorneys in advancing the interests of their low-income and elderly clients in the area of consumer law. NCLC staff attorneys write and publish sixteen legal treatises on various federal and state statutes that affect consumer law. In particular, *Truth In Lending* (5th ed. 2003) and its earlier editions have provided analysis of TILA for over two decades. For over twenty-five years, NCLC staff have testified before Congress and the Federal Reserve Board on the propriety of statutory and regulatory changes to TILA and Regulation Z. As part of its active role in promoting TILA compliance, NCLC staff have been members of the Federal Reserve Board's Consumer Advisory Council since its inception.

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning, non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has repeatedly and successfully spearheaded enactment of major legislation to improve protection for consumers who buy new or used vehicles. Such legislation, including laws aimed at curbing deceptive and discriminatory auto lending practices, was adopted by the California Legislature and signed into law by Governors from both major political parties. In particular, CARS has advocated for improvements in laws regarding auto financing, the matter at issue in this case. As a result of its advocacy efforts, CARS has a substantial interest in the outcome of this appeal.

The U.S. Public Interest Research Group (U.S. PIRG) serves as the national lobbying office for the state PIRGs, which are non-profit, non-partisan public interest advocacy groups active around the country. U.S. PIRG and the state PIRGs have a longstanding interest in preserving the rights of consumers against unfair financial practices. The PIRGs have produced research reports documenting predatory and deceptive financial practices, have advocated for reform legislation, and have served as *amicus curiae* in state and federal courts.

SUMMARY OF ARGUMENT

Congress enacted the Truth In Lending Act (TILA) over thirty-five years ago to mandate truth in the market place, foster fair competition, and enable the informed use of credit in the national economy. The animating spirit of TILA is that Congress expects and intends honesty to prevail in the marketplace so that it can function properly. Despite TILA, car dealers continually come up with creative ways to avoid providing consumers with information necessary to make an informed purchase. Pretending to offer a deal, locking the consumer into the deal, putting the consumer into a car, and then changing the deal after the fact and tricking the consumer into believing that the consumer must go along with the changes, as occurred here, is something unscrupulous dealers have done to all too many consumers. This scam is aptly called a "yo-yo" deal, because the consumer is on a string that the dealer pulls.

Another fraud illustrated by this case occurs when dealers add inflated charges to a credit transaction for

products that are never delivered or even requested. Without the incentive provided by TILA's statutory damage provision, a dealer who gets caught engaging in the yo-yo scam or adding false charges can look at the $1,000 damage limit favored by the petitioner Koons as an insignificant cost of continuing to engage in lucrative, but illegal, deceptive credit scams. This is particularly true since only a small proportion of consumers will ever realize that their legal rights have been violated and even be able to find an attorney to represent them or pursue a case against a dealer.

Congress's removal of the $1,000 cap on statutory damages for TILA violations involving vehicle finance and certain other credit transactions does not, as Koons claims, create classifications that lead to irrational results or threaten the economy. Sound reasons exist for Congress to distinguish between these credit transactions and other mortgage and lease transactions. In addition, a $1,000 award was a significant amount in 1968 when Congress adopted TILA but is equivalent to only $185.70 today. Removal of the cap restored statutory damages to the original market impact that Congress intended. Koons cannot show that Congress acted irrationally by altering the statutory damages for different classes of transactions.

ARGUMENT

I. THE TRUTH IN LENDING ACT IS INTENDED TO BENEFIT THE ECONOMY AND CONSUMERS BY PROMOTING THE INFORMED USE OF CREDIT.

The primary purpose of TILA is to enhance competition and promote the informed use of credit. 15 U.S.C.

§ 1601(a). TILA was enacted in 1968 after eight years of Congressional consideration to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *Id.* Section 1601(a) emphasizes the importance of TILA to the economy:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers.

TILA compliance protects the "ethical and efficient lender or credit extender," thus "invigorat[ing] competition." 109 Cong. Rec. 2029 (1963) (remarks of Sen. Douglas). The Court recently confirmed this conclusion: "Congress enacted the Truth in Lending Act in part because it believed 'consumers would individually benefit not only from the more informed use of credit, but also from heightened competition which would result from more knowledgeable credit shopping.'" *Till v. SCS Credit Corp.*, __ U.S. __, __, 124 S.Ct. 1951, 1963 (May 17, 2004) (quoting S. Rep. No. 368, 96th Cong., 2d Sess. 16, *reprinted in* 1980 U.S.C.C.A.N. 252) (footnote omitted). TILA also promotes consumers' efficient use of credit "by requiring all creditors to disclose credit information in a uniform manner." 1968 U.S.C.C.A.N. 1962, 1970. "The cost of credit should be disclosed fully, simply, and clearly." *Id.* at 1965 (quoting President Johnson).

The statute is remedial in nature, "designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation." *Inge v. Rock Financial Corp.*, 281 F.3d 613 (6th

Cir. 2002) (*quoting N.C. Freed Co., Inc. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir. 1973)). Its private attorney general enforcement provision is fundamental:

> The Truth in Lending Act ultimately serves the dual purpose of providing a remedy for harm to the monetary interests of individuals while serving to deter socially undesirable lending practices. Congress focused on the individual consumer of credit as the person primarily injured who should be encouraged to prosecute actions and should be allowed to recover directly and adequately for harms done.

First National Bank v. Flatau (*In re* Wood), 643 F.2d 188, 191 (5th Cir. 1980). *Accord Murphy v. Household Finance Corp.*, 560 F.2d 206, 210 (6th Cir. 1977). In light of these purposes, the Act must be interpreted so as to provide an incentive for creditors to comply with it.

Some twenty-five years ago, Congress reaffirmed TILA's purpose by enacting the 1980 Truth in Lending Simplification and Reform Act. Pub. L. No. 96-221, 94 Stat. 132, 168 (March 31, 1980) (the Simplification Act). Its goals were to "provide the consumer with clearer credit information, make creditor compliance easier, limit creditor civil liability for statutory penalties to only significant violations, and strengthen the act's administrative restitution enforcement." S. Rep. No. 368 at 16, *reprinted in* 1980 U.S.C.C.A.N. at 251. Congress specifically noted that "the Truth-In-Lending Act is the first consumer credit law passed by Congress and remains today one of the Nation's most important consumer protection laws." *Id.*

Significantly, the Simplification Act limited the liability of assignees such as banks and other financial institutions that buy retail installment contracts from car

dealers and other merchants. The Simplification Act eliminated TILA liability for virtually all contract assignees, except for a TILA "violation . . . apparent on the face of the disclosure statement. . . ." 15 U.S.C. § 1641. Furthermore, Congress narrowed the definition of a covered "creditor," which previously covered both the credit-arranging seller and the financing entity, *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 157-58 (1981) (per curiam), to cover only the dealer who initially extends the credit through the use of retail installment contracts. *Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457, 459-61 (5th Cir. 1999). These changes substantially reduced the financial incentives that previously motivated the banking industry's oversight of its assignors and meant that compliance would rest almost exclusively in the self-policing efforts of the originating dealers. Consequently, even when an assignee's employees train and coordinate the dealer's employees who engage in deceptive practices, TILA liability remains only with the dealer. *Knapp v. Americredit Financial*, 245 F. Supp. 2d 841, 847-48 (S.D.W. Va. 2003).

As the initial lender, it is the originating dealer who stands to profit most from anti-competitive and anti-consumer practices when those illegal practices do not appear on the face of the credit contract as a TILA violation, and it is the dealer alone who is liable for such TILA violations. To combat such deceptions, Congress created statutory damages to provide an incentive for those originating dealers to comply with TILA.

II. TILA'S REQUIREMENTS ARE DESIGNED TO DETER THE ABUSIVE "YO-YO SALE" AND FALSE CHARGE PRACTICES IN WHICH KOONS ENGAGED IN THIS CASE.

A. Unfortunately, The Two Deceptive Sales Techniques Used By Koons Against Mr. Nigh Are Recurring Practices For Businesses Who Refuse To Compete Openly And Fairly In The Marketplace.

TILA recognizes that, for the marketplace to perform properly, consumers must be given accurate information about their purchase and an opportunity to shop for better terms. Certain dealers like Koons seek to foreclose this competition and comparison shopping. Here, Koons obscured the cost of credit by changing the deal after locking the consumer into it. Koons took Mr. Nigh's trade-in, had him sign papers, and sent him on his way in his newly purchased used car as if the deal were final. In fact, however, Koons called Mr. Nigh back twice to sign new versions of the credit contract – versions that were advantageous to Koons and harmful to Mr. Nigh. This practice is commonly known as "on-the-spot delivery," "spot delivery," or a "yo-yo sale," because the dealer first lets the consumer leave the lot "on the spot" with the car, and then pulls on the string to bring the consumer back to sign a new, more expensive credit contract. The string is usually the down payment or trade-in that the dealer holds to pull the consumer back when the dealer claims the credit contract was not approved. *See Rucker v. Sheehy Alexandria*, 228 F. Supp. 2d 711, 718 (E.D. Va. 2002).

As part of the yo-yo sale in this case, Koons wrote a second contract that included an illegal charge for a

fictitious product. As found by the jury, Koons intentionally included this $965 charge on the second contract with knowledge that there was no basis for the charge. After Koons engaged in the anti-competitive and illegal tactic, it then kept Mr. Nigh from shopping elsewhere by lying to him that his trade-in had been sold. In this case, Koons was caught in the illegal practice of charging a consumer almost $1,000 extra for a fictitious product, and then lying to keep some other more honest lender from doing business with him.

As would many consumers, Mr. Nigh objected to these practices once he learned of them. At that point, Koons increased the coercive pressure on Mr. Nigh by threatening to have criminal charges brought against him unless he signed a third credit contract. Given that Koons had not yet given him title to the truck, Mr. Nigh naturally believed that Koons would and could falsely bring criminal charges against him, and he felt forced to sign a third contract. At this point, any resemblance to the competitive marketplace vanished, and any hope an honest car dealer or lender had of obtaining Mr. Nigh's business vanished with it.

Congress enacted TILA to enhance and strengthen the American economy by increasing the efficiency of the marketplace. The Court succinctly stated this guiding principle thirty-one years ago in its initial and seminal TILA case: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973). Deceptive businesses like Koons that are willing to lie and cheat undermine that promise and vision for consumers such as Mr. Nigh. As Judge Gregory, the dissenting judge below, stated: Koons "engaged in a

variety of scurrilous business practices that support the jury's finding of liability under both TILA and the [Virginia Consumer Protection Act]." Pet. App. 22a. Although Koons's conduct is reprehensible, it is not uncommon among less scrupulous car dealers, and it deserves the penalty enacted by Congress to discourage consumer deceptions and anti-competitive practices.

The yo-yo transaction benefits the unscrupulous dealer, defeats the dealer's honest competition (undermining the market system), and causes loss of consumer time, money, and resources. In its most predatory form, as here where the dealer fraudulently concealed the option of simply canceling the transaction by misrepresenting that the trade-in had been sold, the yo-yo sale is merely an updated variation of the classic bait-and-switch scam. The yo-yo sale would rapidly disappear if the dealer risked having to pay the damages enacted by Congress.

In *Rucker*, the court detailed how deceptive and pernicious a yo-yo sale really is:

> A dealer lures a prospective buyer with a financing deal which is unlikely to win approval. The buyer is then allowed to drive away in the car and consider herself the owner for a period of time, only to be called back in when the financing terms are rejected. Back at the dealership, the buyer is persuaded to sign a second deal, backdated to the original date of delivery, with less favorable financing terms. At this point, the buyer is quite likely to sign the deal, even if she may have balked at the terms as an original matter. Psychologically, the buyer has been given a week to become attached to the car, and is less likely to shop around. The buyer is likely unaware of her right to return the car she thinks

> she has already bought. Indeed, she may not have been told that the original financing fell through, and she may be misled into thinking that the second deal is a better deal. In these circumstances, a buyer will not wish to return the car and face the embarrassment of having to explain to family and friends that she lost the car because she was not creditworthy. Once the backdated contract is signed, there is no evidence on the face of the controlling legal documents that the terms of the deal which the consumer signed actually changed after she took possession of the car.

228 F. Supp. at 718-19 (footnotes omitted); *accord Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004).

The central truth of a normal retail installment sales contract is that the dealer is the original creditor who has extended credit to the consumer. The dealer then attempts to sell the credit contract to willing buyers, i.e., potential assignees. If the dealer is happy with the terms offered by a potential assignee, it sells the credit contract. If the dealer is unhappy with the terms or is unable to complete the sale for some reason, the dealer maintains its status as creditor and is entitled to receive monthly payments.

Walker Mobile Home Sales, Inc. v. Walker, 965 S.W.2d 271 (Mo.App. W.D. 1998), is a typical and unremarkable installment sale case that illustrates this principle. *Walker* involved a mobile home installment sale that included seller-arranged financing, with the seller listed as the initial payee. When the potential assignee refused the assignment, the seller accelerated the balance and then sued the consumer for it. The appellate court held that the seller, as the initial (and only) payee, was obligated to accept installment payments and abide by the financing

terms established by its own contract. *Id.* at 275-76. Some unscrupulous dealers, like Koons, decide to call off the first contract when the dealer cannot sell it and then try to trick the consumer into signing additional contracts. Even assuming the credit contract contained a valid condition that allowed for Koons to simply cancel the credit when it was unable to sell the credit contract on the desired terms, no legitimate market reasons exist to force a consumer to sign a new contract on different terms.

A deceptive practice that is closely related to (and sometimes accompanies) the yo-yo sale is the use of charges for fictitious products or services. When a creditor is unable to make its desired profit by selling a credit contract, and when it decides to force the consumer into signing a second or third one, the creditor may try to "create" additional profit. One method employed by some dealer-creditors is to add charges for goods or services not requested or delivered. In this way, the assignee's purchase of the credit contract will give the original creditor extra dollars with no corresponding cost to the creditor. In Mr. Nigh's transaction, Koons knowingly added $975 to the second contract for a sham Silencer car alarm, in an effort to increase its overall profit after selling Mr. Nigh's credit contract. Other dealers may call these fictitious fees "filing fees," *see Abbey v. Columbus Dodge*, 607 F.2d 85 (5th Cir. 1979); *Fielder v. Credit Acceptance Corp.*, 19 F. Supp. 2d 966 (W.D. Mo. 1998), *rev'd in part on other grounds*, 188 F.3d 1031 (8th Cir. 1999); and others may call them "acquisition fees." *See Knapp*, 245 F. Supp. 2d at 845. Regardless of the label, where (as the jury found was the case here) the fee is fictitious, the creditor is simply lying to its consumer to grab money that it is otherwise not entitled to receive.

Unscrupulous dealers gain an unfair advantage from a yo-yo sale by barring the consumer from the competitive market. The dealer has the consumer's original down payment, the consumer's trade-in vehicle, and the consumer's signature on a contract – all presumably the result of a truly competitive marketplace – that the dealer can reject if the dealer is dissatisfied with the terms offered by potential assignees. Of course, the dealer will not tell the consumer that it was unhappy with the terms available in the marketplace when it tried to sell the credit contract and will instead claim that "financing was denied" or "the lender did not approve." In other words, in the yo-yo sale, the dealer lies to the consumer so that the consumer is bound to the deal, even though the dealer is not. If the consumer objects to this façade, the dealer has many strings with which to play the consumer like a yo-yo, such as: "Your trade-in has been sold," or "You will be arrested if you do not pay," or "I am keeping your down-payment." Furthermore, when the dealer then adds to the subsequent contracts that the consumer is being forced to sign charges for products or services that the consumer does not receive, the dealer improperly benefits by receiving the proverbial "money for nothing." As clearly and simply captured by the South Carolina Supreme Court, "Stokes, and other car dealerships, could easily cure the unfairness of such practices by . . . telling customers the truth about their credit." *Singleton*, 595 S.E.2d at 468.

B. The Anti-Competitive Practices Engaged In By Koons And Other Similar Bad Actors Hinder TILA's Goal Of Enhancing And Strengthening The Economy.

Several systemic problems arise when the original creditor unilaterally tries to disclaim a credit transaction

or imposes hidden extra charges in the credit transaction. The primary result of the yo-yo sale is that it impedes the consumer's ability to shop around, undermining one of the primary purposes of TILA and harming both the consumer and honest merchants in a competitive marketplace. Furthermore, when phony charges are used in a credit transaction, a consumer cannot determine the true annual percentage rate (APR) and thus is unable to make the simple comparison between competing APRs that allows for accurate credit shopping.[2]

TILA compliance merely requires the creditor to provide accurate written disclosures to the consumer before the consumer agrees to accept the credit. To accomplish the yo-yo deception, the dealer may decline to give the consumer any TILA disclosures at all until the financing is approved. *See Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862, 863-64 (6th Cir. 2003); *Knapp*, 245 F. Supp. 2d at 844 ("We wouldn't give them copies of a contract until it was funded from Americredit because there may be an argument with [Americredit's personnel] over a fee or something, that I couldn't increase the price of the car to cover his fee enough," quoting the car salesman.) Another way the dealer may violate TILA is to disclose fictitious credit terms without identifying them as estimates as required by Federal Reserve Board Regulation Z, 12 C.F.R. § 226.17(c)(2)(i). The consumer may instead be given

[2] The APR is "the single most useful disclosure mandated by the Act," "calculated from (i) the amount of the finance charge, (ii) the amount of credit extended, and (iii) the term of the extension of credit – the time period between the date interest starts accruing and the date of the last payment." *Krenisky v. Rollins Protective Services Co.*, 728 F.2d 64, 66 (2nd Cir. 1984).

sequential sets of inaccurate TILA disclosures or, sometimes, backdated disclosures. *See Rucker*, 228 F. Supp. 2d at 714-15.

The goal of TILA is to strengthen competition among firms engaged in the extension of consumer credit by assuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). Yo-yo sellers seek to accomplish the opposite by obscuring the true credit terms while precluding the consumer from shopping for other terms. Those creditors who add sham charges to their credit contracts similarly seek to keep the consumer in the dark and keep other, more honest competitors from obtaining the consumer's business.

III. UNCAPPING STATUTORY DAMAGES FOR CERTAIN TRANSACTIONS IS A RATIONAL STATUTORY SCHEME.

Where, as here, the language of a statute is clear, the Court will honor Congress's words unless a party can meet the very heavy burden of proving that doing so would produce irrational and absurd results. Effectively recognizing that they must meet this arduous test, Koons and its *amici* argue that following Congress's plain language in removing the cap on TILA statutory damages for certain non-mortgage, non-lease transactions would produce irrational, absurd results.

The arguments of Koons and its *amici* lack merit. In fact, Congress's removal of the cap on statutory damages under § 1640(a)(2)(A)(i) is highly rational. Deleting the cap restores the impact of statutory damages that Congress

initially intended when it enacted TILA 36 years ago. Because of inflation, a $1,000 statutory damages award in 1968 is equivalent to only $185.70 today.[3] This erosion of the statutory damages award by itself is a compelling rationale for Congress's removal of the cap.

Contrary to Koons's contention, the fact that Congress merely increased rather than eliminated the (A)(iii) cap on statutory damages for closed-end mortgage loans is entirely consistent with its deletion of the (A)(i) cap. A creditor who violates certain material disclosure requirements in connection with a non-purchase money mortgage loan faces not only actual and statutory damages but also rescission of the transaction for up to three years after consummation. 15 U.S.C. § 1635; *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998). If a consumer rescinds such a transaction, the creditor forfeits all right to "any finance charge or other charge." 15 U.S.C. § 1635(b); Federal Reserve Board Official Staff Commentary on Regulation Z, 12 C.F.R. Pt. 226, Supp. I, § 226.23(d)(2)-1. Thus, in the case of a rescission near the three-year mark, the lender forfeits three years of interest, plus closing costs. This remedy is virtually always significantly larger than the (A)(iii) $2,000 statutory damages. Further, like an uncapped double-the-finance charge statutory damage award, the dollar amount of the rescission remedy will be larger if the loan (and thus the finance charge) is larger. As a result, by definition, it keeps pace with inflation. Congress's decision to remove the (A)(i) cap on statutory

[3] Figure obtained by use of U.S. Department of Labor Inflation Calculator at www.bls.gov on May, 12, 2004.

damages for non-mortgage transactions is therefore in balance with the remedies for mortgage transactions.

Statutory damages in consumer leasing cases under (A)(ii) are indeed still capped at $1,000, but Koons ignores the rational grounds within the statute for this distinction. Before Congress enacted the Simplification Act in 1980, statutory damages were available for violation of any disclosure requirement in both lease and non-lease transactions. 15 U.S.C. § 1640 (1968) (*amended by* Pub. L. No. 96-221, Title VI, § 615, 94 Stat. 180 (1980). The Simplification Act limited statutory damages for TILA disclosure violations in non-lease transactions, i.e., (A)(i) transactions, to a handful of disclosures that Congress deemed most significant. For consumer leasing cases, i.e., (A)(ii) transactions, however, Congress retained strict statutory damages liability for *any* disclosure violation, no matter how technical. When it revised TILA again in 1995, Congress could well have concluded that the cap on statutory damages was still justified in lease cases because of the much broader availability of statutory damages.

Nor was it irrational for Congress to allow certain kinds of statutory damages to exceed the $5,000 criminal fine for a knowing and willful TILA violation. 15 U.S.C. § 1611. First, in (A)(iii) mortgage cases, the financial effects of § 1635 rescission will already exceed that amount in many, if not most, situations. Second, TILA authorizes not only a $5,000 fine, but also imprisonment for up to a year – a penalty far more severe than any fine or statutory damages award. Even without any fine or imprisonment, a criminal conviction could prevent a motor vehicle dealer from obtaining a state-mandated bond or retaining a dealer's license. Thus, even though the fine

itself is limited to $5,000, criminal sanctions remain TILA's most severe penalties, even in cases where an uncapped double-the-finance charge remedy is available.

Most importantly, a business like Koons that engages knowingly in a scurrilous deceptive practice to illegally obtain $975 for phantom charges should not be heard to claim that Congress intended to limit the remedy for such illegal behavior to a mere $1,000 fine. "[J]udges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme." *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 565 (1980). Because of the complex nature of TILA, "litigation is not always the optimal process by means of which to formulate a coherent and predictable body of technical rules." *Id.* at 568 n.12. Here, Koons attempted to cheat Mr. Nigh out of almost $1,000. Unlike many victims of such consumer scams, Mr. Nigh was able to locate counsel who was willing to fight this case all the way through to a successful conclusion. If the TILA remedy were limited to only $1,000, Koons would have less incentive to stop mistreating future customers in the same way.

IV. TILA STATUTORY DAMAGES OF DOUBLE THE FINANCE CHARGE WILL NOT THREATEN THE ECONOMY.

Koons's *amici* speculate with no substantiation that giving effect to the plain meaning of TILA's statutory damage provision would have ruinous consequences for the nation's economy. Brief of American Bankers Association, *et al.* (hereinafter "Bankers Ass'n brief") at 25-29. The Bankers Association brief cites only the volume of lending in the United States, as if the cost of enforcing TILA is somehow related to those huge numbers. However,

there is no reason to believe that the vast majority of lenders are regularly violating TILA, or that it would be a great burden on our economy even if consumers pursued every TILA violation to a successful conclusion.

In any case, the enforcement of TILA does not approach such a level. TILA cases make up only a minuscule portion of litigation in the United States. Of approximately 157,000 state and federal judicial decisions added to the Westlaw database in 2003, only 300 even mentioned the term "Truth in Lending."[4] In fiscal year 2002-03, only 606 of the 254,499 civil cases filed in federal district courts were listed as TILA cases.[5] Even if consumers won every one of those cases, even if every one of those cases fell under (A)(i), and even if every plaintiff had finance charges at the high end like Mr. Nigh, total damage awards would be less than $15 million – less than one one-thousandth of a percent of the $2 *trillion* in outstanding consumer credit cited by Koons's *amici*. *See* Bankers Ass'n brief at 25.

Koons's *amici* also complain that TILA imposes on creditors hypertechnical requirements for which they can be liable despite good faith compliance efforts. Bankers Ass'n brief at 27-28. But in characterizing TILA as

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[4] The Westlaw search was conducted on May 12, 2004, using the search terms "Truth +2 Lending & da(bef 1/1/2004) & da(aft 1/1/2003)." The number of judicial decisions per year was approximated with the assistance of a Westlaw research attorney by finding the total number for a 15-day period and multiplying by 24.

[5] Administrative Office of the United States Courts, table titled "Civil Cases, Commenced by Nature of Suit During the 12 Months Periods Ended June 20, 2002 and 2003." The FY 2001-02 figure was 597 TILA cases out of 268,071 civil cases.

hypertechnical, Koons's *amici* cite mostly decisions and Congressional testimony from the 1970's, before the Simplification Act limited statutory damages to "significant" violations. *See* S. Rep. No. 368 at 16, 17, *reprinted in* 1980 U.S.C.C.A.N. at 251, 252.

Basic TILA compliance is not hypertechnical. Any lender can always comply merely by putting into a computer the true amount financed, the true payment terms, and the true payment dates; a standard program will then create written disclosures to be given to the consumer in a form the consumer can keep before the consumer signs. *See* Federal Reserve Board Regulation Z, 12 C.F.R. § 226.22(a)(1) and accompanying footnote (immunizing APR and finance charge disclosure errors resulting from an "error in a calculation tool used in good faith . . . "); *see also* 15 U.S.C. § 1640(c) (establishing a bona fide error defense to all civil liability). It is TILA's simplicity and its requirement of honesty that makes it such a powerful tool for keeping the credit marketplace functioning.

Koons's *amici* also assert that the costs of compliance with TILA are high. *See* Bankers Ass'n brief at 27-8. However, neither the costs of private attorneys general enforcement by consumers nor the (A)(i) statutory damage remedy that is the sole issue before the Court is the culprit in the Federal Reserve Board staff study cited in support of their assertion. *Id.* Even if TILA had no private remedies, it is still enforceable by public officials, as is well documented in that staff study. Indeed, federal regulators have enforcement authority under 15 U.S.C. § 1607 for all TILA violations, even the non-"significant" ones for which statutory damages are unavailable.

It is unclear whether Koons's *amici* are claiming that noncompliance with TILA is rare or widespread since their brief contains contradictory assertions. The Bankers Association brief states on page 27 that 2,700 of the 3,500 institutions examined by the FDIC in 1994 had at least one TILA violation. Yet on the very next page the brief asserts that the *amici's* member institutions "already are largely successful at meeting their TILA obligations." In either case it is sensible to have a strong statutory damages remedy. If noncompliance is rare, then the increase in the statutory damage amount should be of little consequence to creditors. If noncompliance is widespread, then the increase enacted by Congress is reasonable to provide an incentive to creditors to take greater care than they currently do in making their disclosures. Indeed, widespread noncompliance would cry out for an even stronger remedy than that enacted by Congress in 1995.

In sum, the damage remedies enacted by Congress will enforce honest marketplace standards, without which our marketplace economy cannot properly function. If enforced, they will remedy and deter the kinds of serious marketplace abuse emphatically rejected by the jury below.

CONCLUSION

The judgment below accordingly should be affirmed.

Respectfully submitted,

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No. 03-377

In the Supreme Court of the United States

KOON BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37 of the Rules of this Court, the National Automobile Dealers Association (NADA) moves for leave to file the accompanying brief in support of the Petitioner's request that the underlying decision by the United States Court of Appeals for the Fourth Circuit be reversed. Counsel for petitioner has consented to the filing of the accompanying brief. Counsel for the respondent has been asked to so consent, but has not done so.

NADA is a nonprofit national trade association of new motor vehicle dealers. It has approximately 20,160 members located in all 50 of the United States. NADA frequently appears in litigation as *amicus curiae* in cases raising important issues to its members or their customers.

The issue before the Court in this case is whether, under 15 U.S.C. § 1640(a)(2)(A), the statutory damages for violations of the Truth in Lending Act (TILA) in consumer credit transactions, other than leases or closed-end credit secured by real property or a dwelling, are subject to minimum and maximum limits of $100 and $1,000, respectively. This issue is of paramount importance to NADA members, who regularly act as creditors in motor vehicle sales finance transactions subject to TILA and not secured by real property or a dwelling. Absent the imposition of the maximum limit of $1,000 on statutory damages for TILA violations in these transactions, NADA members will be liable for such damages in an amount equal to two times the amount of the finance charge in a particular transaction.

As illustrated by the present case, this amount can be $20,000 or higher in a single transaction, regardless of whether the customer can show any actual damage from the violation and regardless of whether the creditor intended the violation or to harm the customer in any way. If

the underlying decision that the maximum limit of $1,000 on statutory damages no longer applies to these transactions is affirmed by this Court, it will have an extraordinary adverse economic impact on NADA members and their customers by increasing the costs of motor vehicle credit transactions throughout the nation in order to provide huge windfalls to a few consumers involved in credit transactions where unintentional, technical violations of TILA occur. If the underlying decision is reversed, consumers will still be able to recover the full amount of actual damages that they suffer as a result of a TILA violation, plus statutory damages of up to $1,000 and their attorney's fees.

Because its members are directly and materially affected by TILA, NADA has been involved in monitoring the development, enactment, amendment, enforcement and interpretation of that statute since before its original creation in 1968. This experience gives NADA a unique perspective from which to assist the Court in reaching the correct decision on the issue of statutory interpretation before it.

Therefore, NADA respectfully asks that this motion be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A)—though there is no evidence of any Congressional intent to effect such a change—so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

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INTEREST OF THE AMICUS CURIAE

The interest of amicus curiae is described in the accompanying motion for leave to file this brief.[1]

STATEMENT

A. Statutory Background

The Truth in Lending Act (TILA) was originally enacted in 1968. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1666 (2003)). Its basic purpose was, and is, to require creditors to give consumers certain disclosures regarding consumer credit transactions prior to their consummation in order for consumers to evaluate the cost of credit. 12 C.F.R. § 226.1(b). The requirements of TILA are contained in both the statute and in Regulation Z (12 C.F.R. Part 226), which has been promulgated by the Federal Reserve Board under the authority granted it by TILA.

Initially, TILA applied to both closed-end and open-end consumer credit transactions, but did not apply to consumer leases. In the original statute, Congress created a statutory damage provision which provided:

> Section 1640(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this *paragraph* shall not be less than $100 nor greater than $1,000; and
>
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

Consumer Credit Protection Act § 100(a); *see* H.R. REP. No. 90-1940 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1976 (emphasis added). Thus, at the beginning, it was clear that Congress intended that statutory damages in all TILA transactions were subject to a floor of $100 and a cap of $1,000, regardless of the amount of the finance charge. It was also clear that the term "paragraph" referred to 15 U.S.C. § 1640(a)(1).

In 1974, Congress amended the civil damage provision to allow for recovery of actual damages in addition to statutory damages and to deal with statutory damages in class actions. *See* Truth in Lending Act Amendments of 1974, Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1518(1974); 15 U.S.C. § 1640(a)(1). Section 1640(a)(1) was renumbered as Section 1640(a)(2)(A) and the word "paragraph" was changed to "subparagraph." Following this amendment, it remained clear that the $100/$1,000 limits on statutory damages applied to all consumer credit transactions and that the word "subparagraph" now applied to all of 15 U.S.C. § 1640(a)(2)(A).

In 1976, Congress passed the Consumer Leasing Act, which applied TILA protections to consumer leases. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976). At that time, § 1640(a)(2)(A) was amended by dividing it into two subparts —subpart (i) which contained the original language "(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . ." and subpart (ii) stating "(ii) in the case

of a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease . . . ." Following both of these subparts and separated from them by a comma, Congress retained the phrase ". . ., except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . ." The purpose of this amendment was to provide a separate measure of statutory damages for consumer leases because "[t]he formula for individual penalty recoveries in Truth in Lending (twice the finance charge in the transaction) is inappropriate for violations of [the Consumer Leasing Act] since leases generally do not contain identifiable finance charges." S. REP. NO. 94-590, at 8 (1976). The measure of damages for leasing violations was set at 25% of the total monthly payments under the lease, which "amount is intended to represent a civil penalty equivalent in dollar amount to that imposed on other creditors." *Id.*

Subsequent to this amendment, the courts, including the Fourth Circuit, interpreted the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" as continuing to apply to all of subparagraph (A) and not just to subpart (ii) relating to consumer leases. *Mars v. Spartanburg Chrysler Plymouth, Inc.,* 713 F.2d 65, 67 (4th Cir. 1983); *see also Purtle v. Eldridge Auto Sales, Inc.,* 91 F.3d 797, 800 (6th Cir. 1996); *Cowen v. Bank United of Texas,* 70 F.3d 937, 941 (7th Cir. 1995); *Dryden v. Lou Budke's Arrow Fin. Co.,* 661 F.2d 1186, 1191, n.7 (8th Cir. 1981). Accordingly, violations of TILA in connection with motor vehicle sales finance transactions and other consumer credit transactions continued to result in statutory damages of no less than $100 and no more than $1,000.

In 1995, Section 1640(a)(2)(A) was again amended by the addition of a third subpart which provided "(iii) in the case of individual action relating to a credit transaction not

under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000." Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 6, 109 Stat. 271, 274 (1995). The purpose of this amendment was to raise both the minimum and maximum limits on statutory damages in the case of closed-end credit transactions secured by real property or the consumer's dwelling. *See* H.R. REP. NO. 104-193, at 99 (1995); 141 CONG. REC. S14566, S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); 141 Cong. Rec. H9513, H9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum). With this amendment, the statute now reads:

> (a) [A]ny creditor who fails to comply with any requirement imposed under this part, . . . with respect to any person is liable to such person in an amount equal to the sum of —
>
> . . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 . . . .

After the 1995 amendment of § 1640(a)(2)(A), the Seventh Circuit ruled that the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" still applied to statutory

damages under both subparts (i) and (ii) of subparagraph (A). *Strange v. Monogram Credit Card Bank of Ga.*, 129 F.3d 943, 947 (7th Cir. 1997). In doing so, the court rejected the assertion that, by adding subpart (iii) to raise the limits on statutory damages for closed-end credit transactions secured by real property or dwellings, Congress somehow intended to remove those limits completely for all other consumer credit transactions, except consumer leasing. *Id.*

B. The Decision Below

In the present case, the Fourth Circuit addressed the same question that had been ruled on in *Strange* and, by a 2 to 1 majority, answered the question exactly the opposite from the Seventh Circuit. (Pet. App. 1a-22a.) The majority opinion of the Fourth Circuit acknowledged that, prior to 1995, the term "subparagraph" in the phrase "except that liability under this subparagraph shall not be less than $100 nor greater than $1,000" had been interpreted by its decision in *Mars* and in other circuits' decisions to apply "to the whole of subparagraph (A)." (Pet. App. 11a.) However, according to the majority, following the 1995 amendment, it was necessary to interpret "subparagraph" to mean only subpart (ii) of subparagraph (A) "so as not to render meaningless the maximum and minimum articulated in (iii)." (*Id.*) The court went on to state:

> It could well be . . . that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995. However, the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap *regardless of its intent*. It is the statute, not any inferential intent, that

> constitutes the law. Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent.

(Pet. App. 13a.) (Emphasis added.)

In his dissent, Judge Gregory noted that the term "subparagraph" was used to refer to subparagraph (B) in § 1640(a)(2)(B) relating to limitations on damages in class actions and, therefore, should be construed to refer to all of subparagraph (A) when used in that subparagraph, as it had prior to the 1995 amendment. (Pet. App. 21a-22a.) Judge Gregory argued that it was not necessary to interpret "subparagraph" to mean only subpart (ii) in order to give meaning to subpart (iii) and that the only internally consistent construction of subparagraph (A) was to apply the $100/$1,000 limits to subparts (i) and (ii) and to interpret subpart (iii) as setting higher limits ($200/$2,000) for closed-end credit transactions secured by real property or a dwelling. That is, subpart (iii) creates an exception to the general limitations of $100/$1,000 imposed on statutory damages for TILA violations. (*Id.*) Otherwise, "the inclusion of the phrase 'under this subparagraph' would [itself] be superfluous; the meaning of (ii) would be unchanged by its deletion." (Pet. App. 21a.)

SUMMARY OF ARGUMENT

When used in the federal statutes, the term "subparagraph" references the third-level subdivision of a statutory section that begins with a capitalized letter. Therefore, the plain meaning of "subparagraph" in the phrase "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" is that it refers to all of § 1640(a)(2)(A) and not only to subpart (ii).

Even if the statute were ambiguous, it would be necessary to construe the statute to apply the $100/$1,000 limits on statutory damages to subpart (i) because of the context of the statute, its legislative history and purpose, and the absurd circumstances that will result from the alternative construction.

The word "subparagraph" is used in § 1640(a)(2)(B) in a context that clearly refers to all of subparagraph (B). The presumption that identical words used in different parts of the same act are intended to have the same meaning, therefore, favors construing the word "subparagraph" in § 1640(a)(2)(A) as also referring to all of that statute. This construction also is necessary to avoid rendering the phrase "under this subparagraph" in § 1640(a)(2)(A) superfluous. The fact that the various subparts of § 1640(a)(2)(A) are not intended to be read in isolation from one another is evidenced by the fact that subpart (iii) has no separate measure of damages for the transactions described in that subpart and is obviously intended to borrow the measure of damages contained in the other subparts.

In addition, the legislative history of the statute presents a strong case that Congress has always intended that statutory damages for TILA violations in consumer credit transactions subject to subpart (i) of § 1640(a)(2)(A) be subject to the $100/$1,000 limits. This was the uniform interpretation given the statute by the courts even following the creation of subpart (ii) in 1976 to provide a separate measure of damages for TILA violations in consumer leases, which resulted in the clause containing the $100/$1,000 limits becoming separated from subpart (i). The 1995 amendment that created subpart (iii) did not make any material change in the existing statutory language. There is nothing in the language or history of that amendment which even hints at a Congressional intent to remove all limits on statutory damages for TILA violations in transactions governed by subpart (i). Such an intent would have

been inconsistent with the goal of the 1995 amendment to impose higher statutory damage limits under subpart (iii) for TILA violations in closed-end transactions secured by real property or a dwelling than the limits for violations in other consumer credit transactions.

Perhaps most significant is that the Fourth Circuit's determination that Congress removed the limits on statutory damages for violations in transactions governed by subpart (i) will create absurd results. Under this construction, an automobile dealer who unintentionally fails to disclose required information in connection with a consumer credit sale of a motor vehicle will be liable for an amount equal to twice the finance charge in the transaction, which, as the present case shows, can be $20,000 or higher, even if the nondisclosure causes the consumer no harm. However, a failure to disclose required information in a consumer lease of a motor vehicle will subject the dealer to statutory damages no higher than $1,000. There is no rational basis for Congress wishing to impose statutory damages in consumer credit sales that are 20 or more times higher than the statutory damages imposed in consumer lease transactions.

Also, in the case of many automobile dealers, their liability for statutory damages in individual actions subject to § 1640(a)(2)(A) will exceed the limits on their total liability for statutory damages in class actions which are capped by § 1640(a)(2)(B) at 1 percent of the dealer's net worth. It is extremely doubtful that Congress intended this result.

Even more absurd is the fact that a creditor's liability for statutory damages in a consumer credit sale or loan will be capped at $2,000, if the sale is secured by real estate or a dwelling, and, therefore, brought under subpart (iii), but unlimited up to twice the amount of the finance charge in a transaction not secured by real estate or a dwelling.

Congress could hardly have intended to create substantially lower statutory damage liability in credit sale or loan transactions where consumers have put their homes at risk than in transactions not secured by real estate.

ARGUMENT

I. THE PLAIN MEANING OF THE STATUTE IS THAT "SUBPARAGRAPH" REFERS TO ALL OF SECTION 1640(a)(2)(A).

In construing a statute, this Court begins with the language of the statute. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). In this case, the issue before the Court turns on the meaning of the word "subparagraph" in § 1640(a)(2)(A).

An issue not addressed in the opinion below is whether the term "subparagraph" has a fixed meaning in federal legislative drafting. If it does, that meaning should be adopted. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (terms of art in a statute are to be taken in their technical sense).

According to the United States Congress Data Dictionary of Legislative Documents, the word "subparagraph," when used in federal statutes, references the third-level subdivision of a statutory section that begins with a capitalized letter. *See* Official House of Representatives website at http://xml.house.gov/subparagraph.html (defining the term "subparagraph"); Reed Dickerson, *Legislative Drafting*, 73-74 (1977); James Craig Peacock, *Notes on Legislative Drafting* 12 (1961). Proper use of the word "subparagraph" is illustrated by the 1974 amendment to the statute which renumbered it from § 1640(a)(1) to § 1640(a)(2)(A) and, simultaneously, changed the phrase "under this paragraph" to "under this subparagraph." *See* Truth in Lending Act Amendments of 1974, Pub. L. No. 93-495, § 408, 88 Stat.

1500, 1518(1974). The fact that Congress carefully switched the reference from "paragraph" to "subparagraph" when the designation of § 1640(a)(1) was changed to § 1640(a)(2)(A) demonstrates that Congress understood the fixed, technical meaning of "subparagraph," which refers to a statutory section that begins with a capitalized letter.

This meaning is also supported by the normal use of the word "clause" in federal legislation to refer to subparts within a statute which are designated by lowercase roman numerals within parentheses, such as "(i)", "(ii)", etc. *See* Official House of Representatives website at http://xml.house.gov/subparagraph.html (defining the term "clause"). If Congress intended the $100/$1,000 limits in § 1640(a)(2)(A) to refer only to subpart (ii), it would have used the phrase "under this clause" instead of "under this subparagraph" in stating those limits.

Given this fixed meaning of "subparagraph," it is not possible to reasonably construe that term in § 1640(a)(2)(A) to refer to anything other than all of subparagraph (A). The conclusion of the Fourth Circuit's majority opinion that the meaning of "under this subparagraph" was changed in 1995 to refer only to subpart (ii) of subparagraph (A) is inconsistent with the technical meaning of "subparagraph." The only construction of the statute consistent with this meaning is the determination in the Fourth Circuit's dissenting opinion that the $100/$1,000 statutory damage limits apply to all TILA violations, except for the "specific carve-out from the general rule for real-estate transactions" created by subpart (iii). (Pet. App. 22a.)

II. EVEN IF SECTION 1640(a)(2)(A) IS AMBIGUOUS, RULES OF STATUTORY CONSTRUCTION REQUIRE A FINDING THAT CONGRESS INTENDS THE $100/$1,000 STATUTORY DAMAGE LIMITS TO APPLY TO ALL TILA VIOLATIONS EXCEPT THOSE SPECIFIED IN SUBPART (iii).

Applying its plain meaning, the word "subparagraph" refers to all of § 1640(a)(2)(A); thus, there is no need to engage in further statutory construction to answer the question presented in this case. *Hughes Aircraft Co. v. Johnson,* 525 U.S. 432, 438 (1999) (where the statutory language provides a clear answer, the statutory analysis ends there.) Even if this were not the case, the rules for construction of ambiguous statutes require a finding that Congress intends the $100/$1,000 statutory damage limits to apply to both subparts (i) and (ii) of subparagraph (A). As discussed below, the Fourth Circuit's majority opinion erred by rejecting this construction as implausible and failing to even try to discern Congress' true intent by applying well-established rules for construing ambiguous statutes. When these rules are considered, it becomes clear that Congress intends that the $100/$1,000 limits apply to both subparts (i) and (ii), even if such intent were not required by the plain meaning of the word "subparagraph."

A. Section 1640(a)(2)(A) May Be Reasonably Construed As Applying The $100/$1,000 Limits On Statutory Damages To All TILA Violations Except Those Specified In Subpart (iii).

The primary rule of construction of statutes is to ascertain and declare the intention of the legislature. *Atlantic Mut. Ins. Co. v. C. I. R.*, 523 U.S. 382, 387 (1998). The Fourth Circuit's majority opinion conceded that Congress

may well have intended to apply the $100/$1,000 limits on statutory damages to both subparts (i) and (ii) of Section 1640(a)(2)(A). (Pet. App. 13a.) However, the majority felt compelled to ignore this potential intent and to apply a purportedly literal construction to the statute which presumed that the statute was capable of no other reasonable construction than to apply these limits only to subpart (ii). (Pet. App. 11a.)

The Fourth Circuit's majority opinion's analysis must be rejected because it is reasonable to construe Section 1640(a)(2)(A) as applying the $100/$1,000 limits on statutory damages to both subparts (i) and (ii). Not only does the technical meaning of the term "subparagraph" support this construction; the context in which it is used in the statute does also. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (whether a particular statute is ambiguous is determined by reference to the language itself, the specific context in which is used, and the broader context of the statute as a whole).

The term "subparagraph" in § 1640(a)(2)(A) must be viewed in the context of the use of the identical term in § 1640(a)(2)(B), where "subparagraph" clearly and unambiguously refers to all of subparagraph (B). Therefore, it is reasonable to construe "subparagraph" in subparagraph (A) as referring to all of that subparagraph and not only to subpart (ii). *United States v. Cleveland Baseball*, 532 U.S. 200, 213 (2001) ("It is generally presumed that identical words used in different parts of the same act are intended to have the same meaning . . .").

Also, as noted in the Fourth Circuit's dissenting opinion, if "subparagraph" were intended by Congress to refer only to subpart (ii), there would be no need to include the phrase "under this subparagraph" at all. The only purpose that "under this subparagraph" serves in subparagraph (A) is to clarify that the $100/$1,000 statutory damage limits apply

to all liability under subparagraph (A), except for liability in real estate transactions for which subpart (iii) specifies limits of $200/$2,000. The fact that the only construction of the statute that gives meaning to the phrase "under this subparagraph" is the one that applies the $100/$1,000 limits to both subparts (i) and (ii) demonstrates that is not just a reasonable construction, but the preferred one as a result of the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *Duncan*, 533 U.S. at 174.

In addition, the fact that, if read in isolation, subpart (iii) provides no measure for statutory damages in transactions secured by real estate demonstrates that the individual subparts of subparagraph (A) are not intended by Congress to stand alone. The only way the $200/$2,000 limits under subpart (iii) can be given meaning is to assume that the measures of damages in the other subparts are applicable to the transactions described in subpart (iii), subject to the higher $200/$2,000 limits. If it is reasonable to construe subpart (iii) by referring back to the other subparts for the applicable measure of damages, then it is also reasonable to construe the language setting forth the $100/$1,000 limits as referring back to both subparts (i) and (ii).

B. The Legislative History Of Section 1640(a)(2)(A) Makes It Clear That The $100/$1,000 Limits Apply To Statutory Damages For All TILA Violations, Except As Provided In Subpart (iii).

Prior to 1995, the courts had uniformly applied the $100/$1,000 limits to both subparts (i) and (ii) of

§ 1640(a)(2)(A). *Strange,* 129 F.3d at 947. This construction was consistent with the history of the statute up to that time. The $100/$1,000 limits were inserted in the original statute and clearly applied to statutory damages for all TILA violations. When consumer leasing was added in 1976, subparts (i) and (ii) were created to delineate different measures of statutory damages for individual actions relating to a consumer lease (25 per centum of the total lease payments), and for other individual actions (twice the amount of the finance charge). These two subparts were then followed by the $100/$1,000 limitation language which was said to apply to all liability "under this subparagraph." There was no indication that by adding to § 1640(a)(2)(A), a new statutory damages measure for violations of the newly created Consumer Leasing Act, Congress intended to remove the $100/$1,000 limits from other TILA violations and to apply them only to leases. Rather, the legislative history revealed that Congress intended the statutory damages for leasing violations "to represent a civil penalty equivalent in dollar amount to that imposed on other creditors." S. REP. NO. 94-590 at 8 (1976).

Similarly, the 1995 amendment to § 1640(a)(2)(A) gave no indication that Congress intended to remove the $100/$1,000 limits from statutory damages for any TILA violations other than in transactions secured by real estate. Quite the opposite. This amendment did not alter any of the existing language of the statute in any material respect and simply added a new subpart (iii) specifying $200/$2,000 limits on statutory damages in individual actions relating to closed-end credit transactions secured by real property or a dwelling. The purpose of that amendment, as made clear from its legislative history, was simply to increase the statutory damage limits for a special category of TILA violations in transactions secured by real property or a dwelling. It is contradictory to suppose that Congress embarked on creating higher statutory damage limits for

TILA violations in connection with real estate transactions than for other TILA violations, only to end up removing the limits for the other violations entirely.

Where the legislative history of an amendment contains no hint that Congress intended to change it in a particular way, this Court has been reluctant to adopt the purported change absent a clear expression of intent to do so in the statutory language. *See Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 352-53 (1999). Neither the language nor the legislative history of the 1995 amendment to § 1640(a)(2)(A) exhibits any indication that Congress intended to remove the $100/$1,000 limits on statutory damages for violations covered by subpart (i).

C. Construing Section 1640(a)(2)(A) To Apply The $100/$1,000 Limits To Statutory Damages For All TILA Violations, Except As Provided In Subpart (iii), Is Consistent With The Statute's Purpose And Avoids An Absurd Result.

"[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). If, in 1995, Congress had removed all limits on statutory damages for TILA violations, other than those in connection with consumer leasing and real estate transactions, it would have created an absurd situation in several respects.

In the retail motor vehicle industry, consumer leasing and consumer credit sales are alternative forms of financing the acquisition of a motor vehicle for a consumer. In a credit sale, the consumer owns the vehicle from the beginning of the date of the sale and pays monthly payments to a lender, which include a finance charge reflecting the cost of the credit extended to finance the sale.

In a consumer lease, the consumer does not own the vehicle, but has the right to possession of it during the term of the lease. In consideration of this right, the consumer makes monthly payments to the lessor which reflect both the amortization of the vehicle's decline in value over the lease term and a rent charge. 12 C.F.R. §§ 213.4(f)(5), (6).

The TILA disclosure requirements for consumer credit sale transactions are set forth in Regulation Z (12 C.F.R. Part 226). The disclosure requirements pertaining to consumer lease transactions are contained in Regulation M (12 C.F.R. Part 213), which has been promulgated by the Federal Reserve Board under the authority granted it by the Consumer Leasing Act. The requirements of Regulation Z and Regulation M are different because of the different nature of the credit transactions to which they apply. However, both regulations are highly technical and complex and create the inherent potential for unintentional violations of their requirements that cause very little, if any, harm to the consumers. Under § 1640(a)(2)(A), consumers can recover damages for such violations even if the failure to disclose caused them no harm and even if they, in fact, received a "windfall gain" from the TILA violation. *Cowen*, 70 F.3d at 940.

Although consumer credit sales and consumer leases are different types of transactions with different disclosure requirements, they serve the same fundamental purpose of allowing the consumer to pay for the ownership and/or possession of a vehicle over time. There is no evidence that Congress is, or should be, concerned with the potential of greater abuse of consumers in one type of transaction compared to the other.

The potential for unintentional TILA violations that cause little, if any, harm to consumers is the obvious reason for Congress' decision to impose limits on the amount of statutory damages that consumers can recover under

§ 1640(a)(2)(A). Without those limits, the potential statutory damages in both consumer credit sales and consumer leases would be extraordinarily high. In a consumer credit sale, the measure of damages, prior to application of any limits, is twice the amount of the finance charge, which as this case shows can be $24,000 or higher. In a consumer lease transaction, the measure of damages is 25 percent of the total monthly payments under the lease.

Because there is no indication that Congress is more concerned about abuse of consumers in connection with consumer credit sales than it is in connection with consumer leasing, it is reasonable to assume that Congress intends to make the statutory damages recoverable for TILA violations in both transactions somewhat comparable. The legislative history supports this assumption. When § 1640(a)(2)(A) was amended in 1976 to create statutory damages for violations of the newly created Consumer Leasing Act, the Senate report explained that the amendment created for consumer leases a civil penalty "equivalent in dollar amount to that imposed on other creditors." S. REP. NO. 94-590, at 8 (1976). There is no indication that Congress ever reached a conclusion that the statutory damages for violations in connection with consumer leases and consumer credit sales should not be equivalent.

However, if the 1995 amendment had, in fact, removed the $100/$1,000 statutory damage limits for TILA violations other than in connection with consumer leases and real estate transactions, the statutory damages for TILA violations in connection with consumer credit sales of motor vehicles would now be far higher than for consumer leases. Statutory damages for consumer lease violations would be capped at $1,000, regardless of whether the violation was intentional or caused significant harm to the consumer, while a dealer committing even an unintentional, technical violation of TILA in connection with a consumer credit sale of a motor vehicle would be required to pay statutory

damages equal to twice the finance charge in the transaction. In the present case, if the respondent had leased a vehicle from petitioner, instead of purchasing it on credit, the maximum statutory damages would have been $1,000. However, because the vehicle was financed through a consumer credit sale, the Fourth Circuit's majority opinion requires the petitioner to pay more than $24,000 in statutory damages. This result makes no sense.

Construing § 1640(a)(2)(A) as imposing unlimited liability for statutory damages equal to twice the finance charge in individual actions involving transactions other than consumer leases or those secured by real estate also makes no sense when the limitation on total liability in class actions is considered. Section 1640(a)(2)(B) limits total recovery in a class action arising out of the same failure to comply by the same creditor to "no more than the *lesser* of $500,000 or 1 per centum of the net worth of the creditor . . . . " (Emphasis added). The average net worth of a new automobile dealer in the United States at the end of 2002 was $2,230,699. NADA Data Average Dealership Profile at http://www.nada.org/content/navigationmenu/nadadata/ 20033/nadadata_profile.pdf (last visited April 8, 2004). Therefore, the total recovery of statutory damages in a class action against the average automobile dealer in this country is capped under § 1640(a)(2)(B) at $22,307, which is lower than the amount of statutory damages awarded to the respondent in this case. It is not reasonable to assume that Congress intended for the total recovery in class actions against a creditor to be less than what can be recovered by a single consumer in an individual action against the same creditor.

The Fourth Circuit's majority opinion's construction makes even less sense when one considers that, under it, if the respondent had given a security interest in his dwelling or other real property as security for the credit sale, the maximum statutory damages liability in this case would

have been $2,000, instead of $24,000. This would have converted the transaction to "a credit transaction not under an open end credit plan that is secured by real property or a dwelling" to which the $200/$2,000 limits on statutory damages under subpart (iii) would have been applicable. Under the Fourth Circuit's construction, a consumer credit sale secured by real estate has maximum statutory damages of $2,000, but one that is not secured by real estate can result in statutory damages of $20,000 or more. This cannot be what Congress intended by the 1995 amendments, particularly given the legislative history indicating that Congress believed that statutory damages should be higher in transactions where the consumer's dwelling or other real property was used as security.

On the other hand, applying the $100/$1,000 limits on statutory damages for all TILA violations except in transactions secured by a consumer's home or other real property is consistent with the statute's purpose without creating any absurd results. The purpose of statutory damages is to create an incentive for private enforcement of TILA violations in situations where no actual damages are caused by the violation. *Purtle,* 91 F.3d at 800, citing *Watkins v. Simmons & Clark,* 618 F.2d 398, 399 (6th Cir. 1980). Because statutory damages under § 1640(a)(2)(A) are accompanied by an award of attorney's fees under § 1640(a)(3), this incentive exists in both consumer leasing and consumer credit sale transactions even with a cap of $1,000. Because a successful claimant under TILA does not have to pay his or her own attorney and may recover up to $1,000, even without showing any actual damages, there is ample incentive for consumers to bring legal action when their rights under TILA have been violated. *See Cowen,* 70 F.3d at 941 (a suit over failure to disclose a $14 charge is not "a quixotic project" because "the plaintiffs, if they win would be entitled to statutory damages of $1,000 without any proof of injury . . .).

Therefore, retention of the $100/$1,000 statutory damage limits for all consumer credit transactions, other than those secured by real estate, promotes in the fullest manner the policy of the legislature in the enactment of § 1640(a)(2)(A) without creating an absurd result, and therefore should be the construction adopted by this Court.

CONCLUSION

Based on the foregoing reasons and authorities, NADA respectfully asks that the Court reverse the Fourth Circuit's decision that the $100/$1,000 limits on statutory damages under 15 U.S.C. § 1640(a)(2)(A) do not apply to subpart (i) of that subparagraph.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICI CURIAE IN SUPPORT OF BRIEF OF PETITIONER KOONS BUICK PONTIAC GMC, INC.

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QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act ("TILA") recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A) – despite the lack of any evidence of Congressional intent to effect such change – so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

IDENTIFICATION OF AMICI CURIAE

The Virginia Automobile Dealers Association ("VADA") is a trade association representing 585 franchised dealers of new and used automobiles throughout the Commonwealth of Virginia. The Maryland New Car and Truck Dealers Association ("MNCTDA") is an association of approximately 320 Maryland franchised new and used car and truck dealers. The Washington Area New Automobile Dealers Association ("WANADA") is a nonprofit trade association representing more than 200 franchised new and used vehicle dealers in the Washington metropolitan area which is comprised of the District of Columbia, Northern Virginia, and suburban Maryland. As a multi-jurisdictional association, WANADA shares many members with VADA and MNCTDA.[1]

All three Associations were formed and maintained for the purposes, among others, of promoting the interests of franchised new and used car and truck dealers, encouraging sound business policies in the interest of the public, and fostering sound and constructive governmental legislation and regulation generally. All three Associations are vitally interested in this matter. Each of the hundreds of members of the Associations sell motor vehicles, a substantial portion of which are financed through Retail Installment Sale Contracts covered by TILA. The question presented has a serious impact on the potential liability of these dealers and the hundreds of thousands of transactions in which they engage annually which are subject to TILA.

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for Amici Curiae authored the brief in whole. No monetary contribution was received toward preparation or submission of the brief, other than monetary contributions by Amici Curiae.

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit ("Court of Appeals") has altered and dramatically magnified the potential liability of a credit grantor under the Truth in Lending Act ("TILA"). TILA, as originally enacted 35 years ago, limited the statutory damages to which a creditor could be subjected to no less than $100 and no more than $1,000. The Court of Appeals in this matter interpreted subsequent amendments to TILA, which revealed no Congressional intention to change these limitations on statutory damages as, in fact, eliminating those limitations for financing transactions not secured by real estate. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119, 126-27 (4th Cir. 2003).[2]

The decision of the Court of Appeals, if followed generally, has a potentially adverse impact on credit grantors who must, at substantial cost, radically increase protective safeguards against any conceivable error in TILA paperwork, increasing the cost of credit and even potentially leading to elimination of certain types of credit.

In reaching its decision, the Court of Appeals approved the granting of exemplary statutory damages so disproportionate to the actual injury that, if awarded in a civil action, they would be constitutionally infirm as a violation of due process.

The decision of the Court of Appeals, combined with earlier decisions severely limiting defenses under TILA, creates a statutory scheme of strict liability for oppressive

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[2] Pursuant to 37.3 of the Supreme Court of the United States, both Petitioner and Respondent consented to the filing of briefs by any and all *amici* who wish to file one.

exemplary damages for technical violations of TILA and must therefore be reversed.

FACTS RELEVANT TO THIS BRIEF

The Respondent, Bradley Nigh, visited the dealership of the Petitioner on February 4, 2000 to purchase a vehicle. He chose a 1997 Chevrolet Blazer. He purchased it under a Retail Installment Sale Contract ("RISC 1") that provided for a $4,000 down payment and, in addition, the trade-in of a vehicle that he owned subject to a security interest with an estimated payoff balance of $7,500.[3]

Approximately three weeks later, the Respondent returned to the dealership in response to Petitioner's request, at which time Respondent was presented with another RISC ("RISC 2") that altered the terms and called for an additional $2,000 down payment. Respondent objected, but agreed to sign RISC 2 and to sign a promissory note for the additional down payment. Approximately one week later, Petitioner contacted Respondent, apparently through his brother, and requested that he again return to the dealership to sign a new RISC ("RISC 3"). Petitioner returned to the dealership on March 5. RISC 3 removed from the agreement the $965 charge for a "Silencer" security system listed on RISC 2 that had not been contracted for and had not been installed. Petitioner signed RISC 3.

Respondent filed suit against Petitioner as a result of the manner in which the sales transactions were conducted, and Petitioner filed counterclaims for the amounts owed on the promissory note and in excess of the original payoff estimate.

[3] This discussion of the facts is based upon the facts reported by the decisions in *Nigh v. Koons Buick Pontiac GMC Inc.*, 143 F. Supp. 2d 535 (E.D. Va. 2001) and *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003).

In April 2001, the United States District Court for the Eastern District of Virginia ruled on cross summary judgment motions filed by the parties. *Nigh*, 143 F. Supp. 2d 535. Thereafter, the case went to trial.

The trial resulted in an award to Plaintiff under the Truth in Lending Act for $24,192.80 and under the Virginia Consumer Protection Act for $4,000. App. at 37a-38a.[4] Following the verdict, the Court awarded Plaintiff attorney's fees and costs of $26,129.10. App. at 53a.

Petitioner appealed the decision of the United States District Court for the Eastern District of Virginia to the United States Court of Appeals for the Fourth Circuit which affirmed the decision. *Nigh*, 319 F.3d at 129. A later request for *en banc* reconsideration was denied. App. at 55a-56a.

ARGUMENT

I. THE COURT OF APPEALS' DECISION HAS A POTENTIALLY ADVERSE IMPACT ON CREDIT GRANTORS.

Billions of dollars in financing for motor vehicles annually may be affected by the decision of the Court of Appeals. In 2003 alone, over 16.5 million new cars and light-duty trucks were sold at retail in the United States.[5] In

[4] The Petitioner's Appendix in this matter will be referred to hereinafter as "App."

[5] Between 1998 and 2003, over 100 million new cars and light-duty trucks were sold in the United States:

Year	New Vehicles Sold
1998	15,591,793
1999	16,954,924
2000	17,402,486

Virginia, 455,839 new vehicles were registered in 2003,[6] and in Maryland 320,868 new vehicles were registered in 2003.[7] Annually, nearly twice as many used cars are sold.[8] A very high percentage of all sales are financed. The National Automobile Dealers Association ("NADA") estimates that 70% of new car sales are financed.[9] Consumer borrowing for vehicle purchases has dramatically increased in recent years. In 1989, $290.9 billion in consumer credit resulting from motor vehicle purchases was outstanding, and by 1998, this had increased to $451 billion.[10] Annually, there are millions

2001	17,177,789
2002	16,847,237
2003	16,675,704

Automotive News 2003 Yearbook; *at* http://www.autonews.com/datacenter,; Automotive News Data Center, *Sales, U.S. Total Vehicle by Make - 2003*, *at* http://www.autonews.com/images/dataCenter/1966.pdf.

[6] Virginia Automobile Dealers Association, *Domestic and Foreign Car Tabular 12/28/2002 through 01/02/2004*, *at* http://www.vada.com/frameset1.asp?LINK=dealership&MAIN=dealership_statreports.

[7] Maryland New Car & Truck Dealers Association, *Maryland Auto Outlook*, First Quarter, 2004, Vol. 8, No. 1.

[8] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES 2002 1011 (2002) reports total vehicle purchases of 45 million vehicles annually. New car dealers alone sold 11.6 million used cars at retail in 2002. *See* 2003 NADA Data Book, *at* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/2003/NADAData_2003.pdf.

[9] National Automobile Dealers Association, *Financing Tips*, *at* http://www.nada.org/NADAGuides/Finance_Tips.htm.

[10] *2000 NADA Data Book at* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/2000/NADAData_2000.pdf (on file with counsel for Amici Curiae VADA and MNCTDA).

of motor vehicle sales transactions generating billions of dollars of credit subject to TILA.

The decision of the Court of Appeals can have a dramatic impact on the financing of sales of vehicles by dealers in Maryland, Virginia, and the District of Columbia, in particular, and in the United States as a whole. Prior to this decision, dealers could sell and finance vehicles with the expectation that their potential liability would be limited. There was no serious dissent from the view that exemplary statutory damages for TILA violations were limited to a minimum of $100 and maximum of $1,000. These Associations will neither restate the statutory history, nor argue in detail Congressional intent. Those subjects are fully explored in the Court of Appeals' decision and the accompanying dissent, and the Amici Curiae Associations expect that these will be fully argued by the parties in this matter.

Instead, these Associations wish to focus on the potential impact of this decision. The decision will allow exemplary statutory damages at double or triple digit multiples of the actual damage suffered by a borrower, and even where no actual damage has been suffered, as in the present case. Respondent in this case suffered no actual damage at all because under RISC 3, Petitioner removed the charge for the Silencer which was improperly included on RISC 2. The "Silencer" included in RISC 2 that was removed from RISC 3 was a $965 item. The resulting verdict from application of the statutory damage formula without limit was $24,192.80. The application of the statutory damage formula in this case thus led to an award of exemplary damages 25 times the cost of the item that was improperly included in RISC 2 and not delivered with the vehicle. The real multiple of exemplary damages to actual damages cannot be quantified since Respondent suffered no actual damages.

Given that the exemplary damages are based on the amount of the finance charges and not upon the amount, if any, of the actual damages suffered by a borrower, the multiple of exemplary damages to the loss from one item for which there was an improper charge could have been much higher. For example, had the dealer's noncompliance been inclusion of a $96 item instead of a $965 item, there would have been little impact on the overall finance charge, but the exemplary damages awarded would have been 250 times the cost of the item.

As another example, in 2002, the average selling price of a new vehicle was $26,163.[11] Financed by an average buyer for five years at an 8% Annual Percentage Rate ("APR") with a 20% down payment, the amount financed would be $20,930, with total finance charges of $4,533 based on a standard amortization table. Statutory damages for a technical violation of TILA will be over $9,000, even though there may not be any compensatory damages at all as a result of the transaction described.

Clearly, a potential liability that is so disproportionate to the actual damages that may be suffered by a borrower or that is imposed even without actual damages will cause credit grantors, in this case car dealers and the finance institutions that accept assignment of RISCs entered into by car dealers, to be far more wary of the credit transactions in which they will participate. Creditors will have to consider steps to limit their liability if Congressionally enacted limits are not applicable. For car dealer credit grantors, additional processes will have to be adopted to prevent any conceivable error, since such an error can lead to exemplary damages of a higher multiple to actual injury than can be Constitutionally imposed

[11] *2003 NADA Data Book, at* http://www.nada/org/Content/NavigationMenu/MediaCenter/NADAData/2003/NADAData_2003.pdf.

for even the most serious, non-reprehensible tortious activity. *See* Argument II, *infra*, at 9-11. These steps, and the likely addition of personnel required to ensure compliance, will increase the cost of lending which must be borne by consumers.

The additional liability may even force creditors to consider whether it is wise to do business with some classes of customers. Dealers may be forced to ask whether transacting business with individuals who have poor credit histories will be worth the cost. These consumers generally borrow at significantly higher interest rates, thus raising the finance charges they pay and raising the potential liability for dealers, in the event of a TILA violation, to a level far in excess of any possible return.

For example, if a consumer with a poor credit history financed the same new average vehicle selling for $26,163, as described *supra*. at 6, for five years with a 20% downpayment at a 19% APR, the total finance charge would be $11,646.90 based on a standard amortization table. A dealer, under the Fourth Circuit's interpretation of TILA, would incur a statutory penalty of over $23,000 for even a minor technical violation of TILA related to such a sale. With the possibility of these damages, almost equal to the price of the vehicle sold and far in excess of any profit on the sale, dealers may be extremely hesitant to conduct business with individuals with a poor credit history.

The potentially adverse impact of this decision on those who provide credit will be imposed in the absence of any evidence whatsoever that Congress intended to eliminate the statutory limitation applicable to finance contracts not secured by real estate. This lack of evidence of Congressional intent was the basis for the Court of Appeals' decision:

> However, the critical point of law – and it is critical – is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap regardless of its intent.

Nigh, 319 F.3d at 128. To the Court of Appeals, where there was no other evidence of Congressional intent to change the statute, the intent necessary to construe what it believed to be ambiguous statutory language must be gleaned strictly from the ambiguous language itself.

The Court of Appeals' error in this case begins with its determination that the language of the statute is ambiguous. There is nothing ambiguous about the statutory language of Section 1640. Congress clearly set forth that the $1,000 cap shall apply to this "subparagraph." As Petitioner thoroughly explains in its brief, "subparagraph" is a term of art in the drafting of federal legislation which refers to the statutory division that begins with a capital letter of the alphabet. *See* Brief for Petitioner, Argument I. With regards to TILA, "subparagraph" specifically makes reference to Section 1640(a)(2)(A) in its entirety. If the Court of Appeals had applied this meaning of the term "subparagraph" it would never have reached the conclusion that the statutory language is ambiguous, and it would not have needed to inquire as to Congress' intent. When the statutory language is clear on its face, Congressional intent need not be examined. *United States v. Turkette*, 452 U.S. 576, 581 (1981) ("If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'") (*citing Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102 108(1980)). From the use of the term "subparagraph," a term

of art, it is clear that it was Congress' intent that the statutory cap apply to individual TILA actions involving credit not secured by real estate.

The Court of Appeals' decision alters 35 years of creditors' understanding of their liability in the event of noncompliance with TILA. TILA is a complex statute for which violations can be found irrespective of either the credit grantor's intent or the true impact on the consumer. *See* Argument III, *infra*, at 12-13. This decision has an incalculable impact upon credit grantors, affecting the individuals to whom they may grant credit, the terms on which credit may be granted, the cost of putting procedures in place for granting credit, and other similar critical issues.

II. THE DECISION APPROVES AN AWARD OF EXEMPLARY/STATUTORY DAMAGES THAT IS SO DISPROPORTIONATE TO THE BORROWER'S ACTUAL INJURY THAT IT IS CONSTITUTIONALLY INFIRM.

Under the decision of the Court of Appeals, statutory damage awards that are dozens and even hundreds of times the size of borrowers' actual injuries, or awards in the absence of actual damages, are a realistic possibility. This Court has repeatedly held that exemplary damages of the magnitude approved by the Court of Appeals, as compared to the actual injury, or in this case the lack of injury, are a violation of due process. Therefore this Court must reverse the Court of Appeals decision and hold that the statutory cap for individual TILA violations is applicable to the amended TILA statute.

The exemplary damages in this case are 25 times the Respondent's compensatory damages, even if the Court assumes the damages are the $965 price of the Silencer despite Petitioner's voluntary subsequent removal of this item

from the transaction. As already noted, if the "Silencer" had been a $96 item instead of $965, the exemplary damages would have been 250 times the compensatory damages. In fact, Respondent suffered no actual damages. If this were a common law case, such an award, judged by the guideposts approved in prior decisions of this Court, would be a violation of due process.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court considered a punitive damages award of $2,000,000 in favor of a purchaser of a motor vehicle which had prior undisclosed damage that reduced the value of the vehicle purchased by $4,000. This Court considered the relationship between that punitive damage award and the compensatory damages suffered in the fraud action filed against the manufacturer of the vehicle. *Gore*, 517 U.S. at 562-570.

In considering the relationship, this Court announced three guideposts to determine whether exemplary damages are disproportionate to the compensatory damages of the Claimant: (1) "the degree of reprehensibility of the nondisclosure;" (2) "the disparity between the harm or potential harm . . . and [the] punitive damages award;" and (3) the difference between the remedy and "the civil penalties authorized or imposed in comparable cases." *Id.* at 575. This Court has reaffirmed these guideposts in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Aut. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).

If this were a common law tort case, the award of exemplary damages approved by the Court of Appeals would be found to be a violation of due process when judged by the three guideposts set forth in *Gore*.

A. The First Guidepost of the *Gore* Test

Using the first guidepost of the *Gore* test, the statutory violation found in this case was not a reprehensible act. To determine the reprehensibility of Petitioner's act, the Court must consider whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 123 S.Ct. at 1521.

In signing RISC 2, the Respondent could have suffered an economic loss, but he did not because the Petitioner, finding the problem itself, had the Respondent return to its dealership to sign RISC 3 that removed the "Silencer" from the transaction. The action initially causing economic damages by Petitioner, which was voluntarily cured by the Petitioner thereby causing no actual damage to Respondent, is hardly the basis for strong punitive sanctions.

B. The Second Guidepost of the *Gore* Test

Using the second guidepost of the *Gore* test, the exemplary statutory damages awarded in this case are clearly disproportionate to the potential economic loss. The Amici Curiae Associations agree that there is no bright line for determining the appropriate relationship between exemplary damages and compensatory damages; however, this Court has

made clear that exemplary damages in the magnitude awarded here are clearly questionable:

> With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm or potential harm to the Plaintiff and the punitive damages assessed, <u>but in practice few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process.</u>

Campbell, 123 S.Ct. at 1516 (emphasis added).

In its interpretation of TILA removing the cap applicable to finance transactions not secured by real estate, the Court of Appeals has, in essence, approved a statutory scheme that allows an award of exemplary damages 25 times the loss from one item improperly included in RISC 2 that was subsequently removed from RISC 3. The interpretation approves the award of substantial exemplary damages in the absence of any actual damages. This Court has repeatedly found that such an award violates due process.

C. <u>The Third Guidepost of the *Gore* Test</u>

As to the third guidepost of the *Gore* test, one must look to awards authorized or imposed in comparable cases. This is, of course, a case involving statutory exemplary damages and not common law punitive damages. Nevertheless, if this had been another type of consumer credit case, limitations would apply. If this had been a Consumer Leasing Act case, the maximum statutory award would have been $1,000. 15 U.S.C. § 1640(a)(2)(A)(ii). Likewise, if this had been a case involving financing secured by real estate, the maximum award would have been $2,000. 15 U.S.C. §

1640(a)(2)(A)(iii). Congress even placed a cap on recovery under class action lawsuits to prevent potentially ruinous liability to creditors. *See* Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 93-278, at 14-15 (1973).[12]

The class action cap, in particular, is illustrative of Congress' intent to limit an individual's potential recovery for a creditor's TILA violation. Congress placed a recovery cap of $500,000 or 1 percentum of the net worth of the creditor on all TILA class action lawsuits. 15 U.S.C. § 1640(a)(2)(B). This cap effectively prevents any individual class member from recovering inordinately large damages. For example, an average dealer sells approximately 775 new vehicles per year.[13] Assuming that approximately 70% of these new vehicle purchases are financed,[14] this creates 543 potential TILA claimants per year. TILA has a one year statute of limitations[15] leading to a potential class of 543 new car buyers in a TILA class action against the average new car dealer. In a class action lawsuit involving a class of this size against a dealer with a recovery of the statutory cap of $500,000, the

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[12] "Purpose of the civil penalty section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying on an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature. Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interest of both creditors and consumers." Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 93-278, at 14-15 (1973).

[13] NADA Data, The New Vehicle Department, *at* http://nada.org/Content/NavigationMenu/MediaCenter/NADAData/20033/NADAData_newvehicle.pdf.

[14] National Automobile Dealers Association, *Financing Tips*, *supra* n. 9.

[15] 15 U.S.C. § 1640(e)

award to each claimant would be approximately $920. This amount is remarkably similar to the cap Congress intended when it imposed the $1,000 limitation on individual actions, and it is a far cry from the $24,192.80 award to the Respondent in this case.

The possibility of such a large damage award in an individual case would, in effect, provide an incentive for parties to file multiple individual actions, evading Congressional imposed limits on class action lawsuits to prevent ruinous damages. Individuals would more likely than not choose to opt-out of class action lawsuits in which they can recover damages of only a few hundred dollars, as illustrated above, for the chance to recover double, or even triple digit multiples of their actual damages, as was awarded in this case leading to multiplicity of litigation - the very thing class action rule were adopted to avoid.

Not only can the award in this case be compared to awards allowed for other actions under TILA, but it can also be compared to awards allowed under similar statutes enacted by Congress which regulate the disclosure of information to the public, like TILA. However, unlike the oppressive and unreasonable statutory awards that result from the Court of Appeals' interpretation of TILA, the awards or penalties for technical violations of these other disclosure statutes are modest and rationally related to the severity of the violation. For example, pursuant to the Consumer Credit Protection Act, 15 U.S.C. § 1692 *et seq.*, any debt collector who fails to comply with the provisions of the act in collecting a debt will be liable for the actual damages sustained and such additional damages that the court may allow, but not exceeding $1,000. 15 U.S.C. § 1692k. Additionally, the penalty prescribed for willfully failing to endorse automotive labels displayed on vehicles for sale, in violation of the Disclosure of Automobile Information Act, shall not be more than $1,000. 15 U.S.C. §

1233(b). It is highly unlikely that it was Congress' intent to place caps on liability in cases involving all other consumer credit transactions regulated by TILA, as well technical and minor violations of other similar disclosure statutes, but allow for statutory damages of double or triple digit multiples of the actual damages, or large exemplary damages in absence of actual damages, for individual TILA claims involving credit not secured by real estate.

D. The Court of Appeals Interpretation of TILA is at Issue.

The *Gore* analysis to determine if a punitive damage award violates due process is especially applicable here because Petitioner is not challenging the constitutionality of TILA itself, but is challenging the Court of Appeals' *interpretation* of TILA. It is that interpretation that goes against years of practice and prior precedent. Statutorily prescribed damages must comply with the due process clause of the Constitution. *See, e.g., St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). Here, the Court of Appeals' *interpretation* of the statutorily prescribed damages provided by Section 1640 (a)(2)(A) clearly violates due process.

When interpreting statutory language, courts have a duty to interpret statutes as to save them from unconstitutionality. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991). Courts have been inclined to interpret statutes in this way because courts recognize that Congress is bound to uphold the Constitution and would not therefore draft a statute which infringes on a party's constitutionally protected rights. *Edward J. DeBartolo Corp., v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In the present case, the Court of Appeals did not follow traditional precedent of construing statutes in accordance with the Constitution, but instead

interpreted Section 1640(a)(2)(A) to violate the due process rights guaranteed by the Constitution.

A statute violates due process when the penalties are "so severe and oppressive as to be wholly disproportional to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co.*, 251 U.S. at 67; *see also United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992). A statutory penalty will violate due process where the penalty is not rationally related to the legislative purpose of the statute and is arbitrary and discriminatory. *See, e.g, Nebbia v. New York*, 291 U.S. 502, 536-539 (1934).[16] Further, a statutory penalty must give fair notice of the conduct and severity of penalty that may be imposed to comply with due process. *See Gore*, 517 U.S. at 574.

Here, the Court of Appeals' interpretation of Section 1640(a)(2)(A) provides for exemplary damages although the Respondent did not suffer any actual damages. However, assuming, *arguendo*, that Respondent did suffer actual damages in the amount of the item that was improperly included in RISC 2, the Court of Appeals has provided for punitive damages in excess of 25 times the actual damages incurred. This penalty is excessive and disproportionate to the actual damage incurred. *See* Argument II, *supra*, at 11. Further, the Court of Appeals decision effectively eliminates any notice that creditors may have had regarding potential

[16] In *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), *United States v. Citrin*, 972 F.2d 1044 (9th Cir. 1992), and *Nebbia v. New York*, 291 U.S. 502 (1934), the issue before the courts was whether the statute in question, as written, violated due process. These cases held that the statutes complied with the due process. The present case is markedly different. Here, the Petitioner has asked this Court not to determine whether the statutory language of Section 1640(a)(2)(A) violates due process, but rather to determine whether the Court of Appeals' *interpretation* of Section 1640(a)(2)(A), without any evidence of Congressional intent, violates due process.

penalties awarded for TILA violations. For over 35 years, creditors believed, based on the plain wording of the statute, that they could receive a penalty of up to $1,000 for each individual violation claimed. Petitioner, as well as other creditors, up until the time the Fourth Circuit Court of Appeals rendered its decision in this case, had no notice that they could be assessed exemplary damages at double or triple digit multiples of the actual damages, even if no actual damages were incurred, for minor technical violations.

It was the duty of the Court of Appeals to construe the statute in accordance with the Constitution, but it failed to do so. Further, it is the duty of the legislature, not the Courts to enact laws. In this case, the Court of Appeals has attempted to enact a new penalty for individual TILA violations without the authority to do so. The Court of Appeals' erroneous interpretation of Section 1640(a)(2)(A) sanction awards violates the due process rights of creditors and therefore must be reversed.

III. This Decision, Combined with Restrictions on the Bona Fide Error and Cure Defenses under TILA, Creates a Punitive Statutory Scheme of Strict Liability.

Prior court decisions have established TILA as a near strict liability statute, and the decision of the Court of Appeals will allow awards of substantial multiples of actual damages, even when, as here, actual damages did not exist. When TILA was enacted, Congress provided two defenses for errors giving rise to potential liability. A creditor who discovers an error, notifies the obligor of the error, and takes action to cure the error will have no liability under the statute. 15 U.S.C. § 1640(b). Similarly, a creditor cannot be held liable for a bona fide error, provided it maintains procedures reasonably adapted to avoid such an error. 15 U.S.C. § 1640(c).

Over the years, the bona fide error defense has been significantly limited. Courts have limited the defense strictly to clerical errors. *See, e.g., Baker v. G.C. Serv. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982). Moreover, the requirement of evidence showing the establishment of procedures reasonably adapted to avoid any such error has limited the availability of the defense. *See, e.g., Hutchings v. Beneficial Fin. Co. of Or.*, 646 F.2d 389, 391 (9th Cir. 1981).

Similarly, the defense of curative action under 15 U.S.C. § 1640(b) has been significantly limited. Courts have also limited this defense to clerical errors. *See Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 251-52 (3d Cir. 1980). Moreover, courts have required a certain formality in the notification of errors and the curative documents: "Without notifying the consumer that the May 27 documents contained errors and that the May 29 documents were curative, defendant cannot use § 1640(b) to avoid liability for violating the [Truth in Lending] Act." *James v. City Home Serv., Inc.*, 712 F.2d 193, 195 (5th Cir. 1983).

Creditors are thus faced with the situation where they can have a technical problem in a TILA contract with no way to cure that problem through a new contract. These creditors will face statutory damage awards that can exceed even the selling price of the product without a way to cure the problem once the contract has been signed.

The decision of the Court of Appeals imposes an interpretation on the statutory scheme which is highly technical and punitive to creditors. Only certain types of errors may be considered clerical errors. Clerical errors will be excused only if there are procedures in place to avoid those errors. And, if there is a problem, simply undoing the problem through another contract is not enough. It must be an error to be cured, and the creditor must follow the formality of

giving actual notification of the need to cure the problem and not just actually cure it. A decision allowing substantial exemplary damages in the absence of actual damages is unjustifiably punitive and this Court should reverse the decision of the Court of Appeals.

CONCLUSION

For the reasons stated in the foregoing Brief of *Amici Curiae*, the Virginia Automobile Dealers Association, the Maryland New Car and Truck Dealers Association, and the Washington Area New Automobile Dealers Association request that this Court reverse the decision of the Court of Appeals and find in favor of Petitioner Koons Buick Pontiac GMC, Inc.

Respectfully submitted.

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